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## THE LAW OF RESTRICTIONS ON LAND IN WISCONSIN

JOSEPH I. SWIETLIK\*

"Ownership" is fast becoming a meaningless term. Whereas once a man could say "I shall" in connection with his lands, today he must ask "May I?" The reason for this change has been the continual growth of limitations and restrictions upon the use of land to the extent that a person today may hold title to property in his own name and yet not be able to use that property without the consent of another, or what is worse, without the consent of the state. In view of these changes in the traditional concepts of title and ownership, and lest this trend proceed to the extent of making legal private ownership a mere technical sham, it is only fitting that some analytical examination be attempted in this area.

The control of land by one who has neither legal title to nor actual possession of land is normally achieved by the use of one of the so-called present, non-possessory interests in land. For convenience, such interests are herein termed "the tools of private zoning." Briefly, they consist of possible future possessory interests (commonly referred to as defeasible estates), licenses, profits, equitable restrictions and covenants at law.

The purpose of this paper is to analyze and evaluate the law of equitable restrictions as it has developed in Wisconsin.

### I. ORIGIN OF RESTRICTIONS

The case of *Tulk v. Moxhay* has been accepted as the beginning of those controls on the use of land which are termed in this paper "equitable restrictions." The Lord Chancellor there laid down the rule that:

" . . . if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."<sup>1</sup>

The holding in this case which was first applied to preserve the use of one of the famous London garden squares has become of in-

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<sup>1</sup> *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (1843).

creasing importance, until today it is the basis for equitable restrictions existing in nearly all modern real estate transactions dealing with newly developed areas. Nor has its expanded application reached its summit. Its only limit appears to be the limits set upon the freedom of contract.

The most frequent use of equitable restrictions has been in the development and division of new lot areas. That is, in order to preserve the desired continuity and general appearance of the new area, most stringent restrictions are being imposed upon the use of the land. The acceptance of these restrictions is no longer at issue. The Wisconsin Court has noted:

"The defendants raise no question as to the right of plaintiffs to maintain the within action for the enforcement of the restrictive covenant. The rights of plaintiffs so to maintain such action is well established."<sup>2</sup>

However, despite their general acceptance, the law concerning equitable restrictions is still not settled.

## II. TERMINOLOGY

At the risk of criticism from those quarters where a different terminology has been developed, this writer has chosen to call those promises limiting the use of lands (which are neither easements nor covenants) "equitable restrictions." The names given to such promises are legion; and it cannot be denied that it is difficult to decide which to apply. However, a brief explanation of the various possibilities will indicate why the term "equitable restrictions" was selected.

Some of the various terms used to describe these promises are "restrictive covenants," "negative covenants," and "negative restrictive covenants." Yet, these promises are not covenants in the strict sense. As will be seen below, they violate the law of covenants in several respects. Thus, these expressions embodying the term "covenant" must be excluded as being misleading.

For a similar reason, any term embodying "easement" has been excluded. Thus, such terms as "easements," "equitable easements," and "negative easements" have been disregarded as being misleading.

The term "negative contracts" has also been used to describe these promises. However, these are not contracts as such. Thus, this term has been set aside.

The term which most closely approaches that selected is "equitable servitudes." The reason for disregarding this term, however, is the close relation which servitudes have traditionally had with easements and profits. Admittedly, this reason is weak; but, it seemed better to select a term which is the less closely related to another legal concept. Thus, the term "equitable restrictions" has been selected.

<sup>2</sup> Perkins v. Young, 266 Wis. 33, 37, 62 N.W. 2d 435 (1953).

## III. TREATMENT

Two major views have been advanced concerning the treatment of equitable restrictions. The first is that they are basically covenants and that the law of contracts should apply.<sup>3</sup> The second is that they are more in the nature of servitudes or easements and that the law of property should govern.<sup>4</sup> Both of these theories are supported by men of legal renown, and both of these theories have shortcomings. If it were possible to balance authority upon a scale, perhaps the more modern property theory would carry the day. A brief examination of these two views and their application to equitable restrictions will indicate their shortcomings to the reader.<sup>5</sup>

Considering first the contractual theory, the law of contracts, alone, will not permit the burden and benefit of a covenant to run with the land. Something more is required. The covenant has to be "an agreement touching the land" and "privity" is required.<sup>6</sup> However, both the benefit and the burden of equitable restrictions do attach to and run with the land regardless of privity. Several explanations have been offered by the supporters of the contractual theory in overcoming this difficulty. One is based upon estoppel. That is, as far as the burden is concerned, one who purchases land with notice of the restrictions is estopped from resisting their validity. As far as the benefit is concerned, its transfer is justified either on a theory of an assignment of a chose in action, or, following a common law rule, that the benefit will run with the land regardless of privity. In criticism of this justification, estoppel based upon notice is an equitable doctrine, resembling the law of easements rather than the law of contracts. The theory of assignment of the benefit does not explain how the benefit can attach to and run with the land, itself. That is, an equitable restriction will run regardless of the existence of an assignment. The statement that the benefit of a covenant will run without privity is a contested point.

Another difficulty in applying the contract theory to equitable re-

<sup>3</sup> For those authorities who uphold the contract theory see: Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174 (1904); Giddings, *Restrictions Upon the Use of Land*, 5 HARV. L. REV. 274 (1892); Stone, *Equitable Rights and Liabilities of Strangers to a Contract*, 18 COL. L. REV. 291 (1918); TIFFANY, REAL PROPERTY §861 (3rd ed. 1939).

<sup>4</sup> For those authorities who uphold the property theory see: G. L. Clark, *Equitable Servitudes*, 16 MICH. L. REV. 90 (1917); Pound, *The Progress of Law*, 33 HARV. L. REV. 813 (1920); Scott, *The Nature of the Rights of the Cestui que Trust*, 17 COL. L. REV. 269, 281, 285 (1917); CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 174; (2d ed. 1947) POMEROY, EQ. JUR. §1295 (4th ed. 1919); RESTATEMENT, PROPERTY, c. 45, Introductory Note, Topic B, and §539, comments a and h. (1944). For a discussion of both views see: Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951, 1067 (1942); 2 AMERICAN LAW OF PROPERTY pp. 401-543 (1952). At p. 427 the AMERICAN LAW OF PROPERTY indorses the property theory.

<sup>5</sup> Because the following problems are discussed at length later in this paper, they will not be extensively footnoted at this point.

<sup>6</sup> See: CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (2d ed. 1947).

strictions is that there is no explanation for allowing a valid cause of action against an adverse possessor who violates the restrictions, because no privity exists.

Furthermore, a change in the neighborhood will normally terminate an equitable restriction, but it will not terminate a covenant. Thus, where there has been such a change, a court may not allow specific performance under the contract theory because of the injustices involved, but a technical cause of action still exists—a cause of action which will, in all probability, adversely affect the title of the burdened land.

Turning then to the shortcomings of the property theory, at common law every easement demanded the existence of a dominant estate; yet, equitable restrictions are often enforceable by the developer of the subdivision after all the lots have been sold. Thus, there seems to be a conflict in applying the property theory of easements to equitable restrictions. However, this difficulty can be explained by permitting the existence of an easement in gross (as does the law in Wisconsin).<sup>7</sup>

When lots in a subdivision are sold subject to restrictions, the first buyer has a cause of action against violation of those restrictions by subsequent purchasers of other lots. Upon what theory is such a suit justifiable? Under contract law it may be permissible by an assignment of the contractual rights; but as is seen above, the contract theory requires privity which is not always present. Under property law three theories have been advanced. Justification has been based on the finding of a trust, a third party beneficiary contract, and a general equitable theory of reliance. However, all of these theories have their shortcomings. It should be noted that these shortcomings are multiplied in the case of a resubdivision in which both parties to the suit obtain their title from the original promissor. Clearly in such a case the assignment of contractual rights under the contract theory cannot apply because the promisee, who would normally be the assignor, is completely out of the picture.

Thus, whichever theory of law is followed difficulties are encountered. These various problems are discussed at length below. As will be seen throughout the discussion, Wisconsin has adopted the property theory.<sup>8</sup>

#### IV. RUNNING OR SUCCESSION

Since 1848 it has been well established that both the benefit and the burden of equitable restrictions run with the land. The basis of this rule is not found in the law of contracts, nor is it based upon privity;

<sup>7</sup> See: *Poull v. Mockley*, 33 Wis. 482 (1873); *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N.W. 550 (1892).

<sup>8</sup> In *Doherty v. Rice*, 240 Wis. 389, 3 N.W.2d 734 (1942), the Court cites *CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND* 149 (2d ed. 1947) to the effect that Wisconsin follows the property theory.

rather, it is essentially a rule of equity applied to property law. As is stated in the American Law of Property:

"Succession of estate between the covenantor and his assignee is an absolute essential to the running of a burden at law. However, equity enforces an agreement running with the land as an equitable property interest in the burdened land appurtenant to the benefited land. Thus, privity of estate between the covenantor and his assignee is entirely immaterial."<sup>9</sup>

In determining whether the benefit and the burden run with the land, equity looks to two factors—the intent of the original parties and notice.<sup>10</sup>

*A. Intent:*

The leading Wisconsin case concerning equitable restrictions is *Boyden v. Roberts* decided in 1907. In that case Johnston sold a parcel of land to Weiss and agreed that none of the land in a certain area would be used ". . . for hotel, club, or camping purposes. . . ." Johnston later sold some lots to the plaintiff and the defendant. It was held that one grantee of Johnston could enforce the equitable restrictions contained in the Johnston-Weiss agreement against another grantee of Johnston. On the question of intent the Court stated:

"The controlling question in all cases seems to be whether the grantor intended to create an equitable servitude which should be appurtenant to the estate or intended for the mutual benefit of the respective grantees of portions of the estate for whose benefit the covenant was made. [cases cited] Whenever it fairly appears from the words of the grant that it was the intention of the parties to preserve a right in the nature of an equitable servitude in the property granted for the benefit of other land owned by the grantor and embraced within the same tract as the parcel granted, such servitude becomes appurtenant to the land of the grantor and the burden thus created will pass to and be binding upon subsequent grantees of different portions of such tract. [cases cited] The question is one resting upon the intention of the grantor respecting the restriction or servitude, and whether the restriction in the conveyance should apply to the portion conveyed only, or to the other lands of the grantor included in a general scheme for the benefit of all the lands of the grantor embraced within such scheme, and the form of the instrument used to create such restriction or servitude is not material."<sup>11</sup>

<sup>9</sup> 2 AMERICAN LAW OF PROPERTY §9.39 (1952).

<sup>10</sup> The fact that intent is necessary for the restriction to run is pointed out by the Court in *Burden v. Doucette*, 240 Wis. 230, at 236, 2 N.W.2d 204, at 210 (1942), where the Court states:

"In *Schneider v. Eckhoff*, 188 Wis. 550, 556, 206 N.W. 838, with reference to the restrictions there under consideration, the court said:

"The serious question involved on this branch of the case consists of whether or not the evidence warrants the conclusion that the original grantors adopted a general plan or scheme which was designed not only for the benefit of the various grantees of the lots or parcels sold and their successors or assigns!"

<sup>11</sup> *Boyden v. Roberts*, 131 Wis. 659, 111 N.W. 701 (1907).

In a dissenting opinion Justice Winslow found no intent that the restriction should benefit all purchasers. He applied a stringent test:

" . . . where the intention is to be gathered from circumstances only, the circumstances relied on must be such as to show such intention by necessary and unavoidable implication."

The majority answered this argument by implying the intent from the agreement, itself:

"The agreement itself meets all these objections. It was designed by its terms to be a general plan or scheme for the enhancement of the value of the property by the protection of all purchasers of any portion otherwise than for first-class residence property."

Thus, an agreement that the land should not be used ". . . for hotel, club or camping purposes. . . ." is sufficient to show the intent required to make the restrictions run with the land.

Since equitable restrictions most commonly appear in newly developed subdivisions, the intent of the parties can easily be established by producing the plan of development together with the desired restrictions both of which are generally recorded. However, in those few cases where no fixed set of restrictions can be produced, a question arises as to what proof is necessary to establish the existence of a plan of development from which the intent to burden the lands can be drawn. The American Law of Property lays down the general rule that:

" . . . where the evidence shows uniform restrictions inserted in the sales of the other lots both before and after the date of the agreement in question, such evidence is sufficient to show the existence of an intention in the parties that the benefit shall attach to the other lots of the promisee."<sup>12</sup>

The Wisconsin Court has looked to several factors in determining the existence of a plan. In *Schneider v. Eckhoff* the general rule that courts do not favor restrictions on the title of land is recognized.<sup>13</sup> That is, if doubtful language is used, no restriction upon the fee will be found. In determining that a plan of development did exist in that case, the court considered three factors. First, the presence of the restrictions in the various deeds was strong evidence of a plan. Second, the fact that the land was platted pointed to the same conclusion. Finally, and perhaps controlling in this case, there existed a uniform building line.<sup>14</sup>

<sup>12</sup> 2 AMERICAN LAW OF PROPERTY §9.29 (1952).

<sup>13</sup> *Schneider v. Eckhoff*, 188 Wis. 550, 206 N.W. 838 (1926).

<sup>14</sup> Other cases in which a general plan or scheme was found are: *Mueller v. Schier*, 189 Wis. 70, 205 N.W. 912 (1926); *Ward v. Prospect Manor Corp.*, 188 Wis. 534, 206 N.W. 856 (1926); and *Peterson v. Gales*, 191 Wis. 137, 210 N.W. 707 (1926).

Perhaps the clearest statement of the test used to determine the existence of a plan can be found in those cases where the court rejected the plea that a plan was in effect. In *Janssen v. Foeller* the Court held that no plan existed and stated:

"The original plan contained no building restrictions. From 1909 on, deeds by the plat owners were given for lots in the several blocks, some with and others without building restrictions. The restrictions, when inserted, were widely variant. . . ."<sup>15</sup>

In *Burden v. Doucette* the Court stated:

"This question is one of intent. The intent cannot be determined solely by the fact that they included the restrictive covenant in some of the deeds of conveyance. It appears that only five of the sixteen lots in block 2 are occupied by dwelling houses. There are no restrictions of any kind indicated on the plat not recorded other than lot numbers and dimensions. Some deeds contained restrictions, others contained none. It cannot be said that the evidence warrants the conclusion that plaintiffs, the original grantors, adopted a general plan or scheme to create a residential district for the benefit of the various grantees of the lots in the platted area. No such plan or scheme has been carried out."<sup>16</sup>

In the case of *Clark v. Guy Drews Post of American Legion No. 88, Department of Wisconsin* the Court determined that what appeared on its face to be a restriction running with the land was in reality merely a personal covenant solely for the grantor's benefit. Undoubtedly the beneficial character of the violation (the land was to be used for the rehabilitation of returning soldiers) had some effect upon the Court, but the Court did go further and distinguished the case on the ground that 52 out of 120 lots were sold without restrictions. The restriction, itself, read as follows:

"It is hereby agreed by and between both of said parties that the premises are to be used only for residential purposes."<sup>17</sup>

In analyzing this restriction, the Court pointed to two factors. First, although words of inheritance are not needed to create equitable restrictions that will pass with the land, their presence is "a strong indication" of such intent. Conversely, their absence, as in this case, may be an indication of a contrary intent. Second, the restriction confers no benefit upon the grantee. That is, there is no indication that the grantor is bound to include similar restrictions in the sale of the other lots. Thus, it was determined that a plan did not exist.

Considering all of the above tests, it appears that the equity court can determine as it sees fit whether the restriction runs with the land.

<sup>15</sup> *Janssen v. Foeller*, 193 Wis. 334, 214 N.W. 338 (1927).

<sup>16</sup> *Burden v. Doucette*, 240 Wis. 230, 2 N.W.2d 204 (1942).

<sup>17</sup> *Clark v. Guy Drews Post of American Legion No. 88, Department of Wisconsin*, 247 Wis. 48, 18 N.W. 2d 322 (1944).



Although this may be a dangerous discretionary practice, it may be best to let the equity court look to all the circumstances, decide each case on its own facts, and either grant or deny relief.

*B. Notice:*

When the doctrine of equitable restrictions was first initiated in the case of *Tulk v. Moxhay*, the Court emphasized the fact that this doctrine was based primarily upon notice. It stated:

"... but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."<sup>18</sup>

Equity would not allow one who bought with knowledge of the restrictions on the land to later deny those restrictions, and thus make them ineffective because of the technicalities of the law.

In *Boyden v. Roberts* the Court reiterated the words of the *Tulk* case:

"Where the general plan or scheme of an agreement restricts property to a certain use and prohibits other uses, it is immaterial whether the covenant runs with the land or not, where the agreement is made for the mutual benefit of all the land though held by different owners. In such case equity will enforce such servitude as between the several grantees of parts of the premises with notice."<sup>19</sup>

This language seems to indicate that all that is required to have any covenant binding upon subsequent purchasers is notice. This is misleading. This writer believes that the words "at law" must be inserted following the word "runs." That is, the covenant need not run at law, where privity is required; but it does actually run in equity.<sup>20</sup> Furthermore, as is seen above, it is essential that the parties intend that

<sup>18</sup> *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (1848).

<sup>19</sup> *Boyden v. Roberts*, 131 Wis. 659, 668, 111 N.W. 701 (1907).

<sup>20</sup> The element of notice in running is pointed out by Tiffany in a rather confusing statement. See TIFFANY, REAL PROPERTY §858 (3d ed. 1939).

"In equity, the question whether such a covenant runs with the land is material on the question of notice only, since if it runs with the land, the purchaser is bound regardless of his knowledge of it, while if it does not so run, he is bound only if he took the land with notice of the covenant."

If it is kept in mind that the word "covenant" refers to a covenant at law, then the quoted sentence can be understood to mean that the purchaser will be bound in equity even if the covenant does not run at law if he has notice. Without analyzing at length at this point whether notice is required for a covenant at law to run with the land, contrary to the above statement from Tiffany that such covenant will run regardless of notice, 2 AMERICAN LAW OF PROPERTY §9.25 (1952):

"Likewise, since the same recording statutes provide that an unrecorded conveyance of a legal easement or of a covenant running with the land at law shall be void as against a subsequent bona fide purchaser, there is today no fundamental difference between the enforcement of legal easements or covenants and equitable servitudes, as against subsequent purchasers of the servient land in respect to this defense of bona fide purchaser for value."

the restrictions run with the land. Once such intent is established, then it will run to all persons with notice.

In all probability the Court was misled in the case of *Huntley v. Stanchfield* by such statements that notice was the sole requirement to make the covenant binding upon subsequent purchasers.<sup>21</sup> In that case the defendant's predecessor in title covenanted with the plaintiff not to use his (defendant's) building as a hotel. The defendant did so use the building. The Court recognized that privity must exist and that the covenant must attach to the land before the covenant would run at law. However, instead of finding these essentials to be present, the Court said that the defendant had notice of the restriction and therefore was bound by it. The element of intent to have the restriction run with the land (usually shown by a scheme of development) was ignored. This case reached the correct result, but upon the wrong theory. It should have been found a covenant at law which runs with the land instead of an equitable restriction. It is doubtful whether the effect of notice, alone, will ever be carried so far as to eliminate the requisite of intent.

As is normally the case, the notice may be either actual or constructive.<sup>22</sup> As a practical matter most buyers will be held to have at least constructive notice (even if their immediate deed does not contain the restrictions) because the restrictions will normally have been recorded when first imposed upon the land.<sup>23</sup> This is sufficient notice to bind the subsequent purchasers. Nor must the instrument be required to be recorded, so long as it may be recorded.<sup>24</sup> In the absence of notice of record, the purchaser will also be held to have constructive notice of those things physically discernable upon the land.<sup>25</sup>

<sup>21</sup> *Huntley v. Stanchfield*, 174 Wis. 565, 183 N.W. 984 (1921).

<sup>22</sup> See 3 TIFFANY, REAL PROPERTY §863 (3d ed. 1939):

"A restrictive agreement is enforced in equity only when he takes with notice thereof. Such notice may be either actual or constructive, and the purchaser is, in accordance with the general rules as to notice, charged with notice of anything showing or imposing such a restriction which may be contained in a conveyance in the chain of title under which he claims, and whether such conveyance is recorded is necessarily immaterial in this regard."

<sup>23</sup> In *Mueller v. Schier*, 189 Wis. 70, 205 N.W. 912 (1926), the immediate deed to the defendant did not contain the restriction. Nevertheless, the Court held that this made no difference and charged the defendant with constructive notice because the restrictions were in his chain of title. For the statutory effect of recording in Wisconsin see: WIS. STATS. §235.49 (1955).

<sup>24</sup> In *Boyden v. Roberts*, 131 Wis. 659, 111 N.W. 701 (1907), the parties put the restrictions in a separate agreement and recorded it. The Court held that the "instrument is one by which the title to the real estate therein described is 'affected in law or equity.'" The Court went on to state:

"... we hold that the agreement between Johnston and Weiss was entitled to record, and, having been duly recorded, was constructive notice." Thus, the buyer will be held to have constructive notice not only of those instruments which are required to be recorded, but also of any recorded instruments which by state law may be recorded.

<sup>25</sup> In *Olsen v. Lindsay*, 190 Wis. 182, 209 N.W. 596 (1926), a covenant against incumbrances given by the seller could not be used as a defense by the buyer against a claim on a mechanics lien because the buyer saw the house being

## V. INTEREST IN LANDS AND THE STATUTE OF FRAUDS

Whether or not the Statute of Frauds applies to equitable restrictions, thereby requiring that they be written, depends upon which theory of law the court will follow. If the court holds that equitable restrictions are to be governed by contract law, then the Statute of Frauds would seem to be immaterial; while if the state followed the law of property and treated equitable restrictions as interests in land, then the Statute of Frauds would apply.

Since the majority of courts consider equitable restrictions as property rights, they also require compliance with the Statute of Frauds. It is stated in the American Law of Property that:

" . . . in the majority of the cases the courts have held that an oral agreement cannot operate to create an equitable servitude so as to be enforceable against either the promissor or subsequent possessor of the burdened land."<sup>26</sup>

Wisconsin is in accord with the majority on this question. The Court stated in *Fuller v. Town Board*:

"That the owner of each lot in the plat had a property right in each and every other lot in the plat by virtue of the restrictive covenants, is well established. *Boyden v. Roberts*, 131 Wis. 659, 111 N.W. 701; *Roberts v. Gerber*, 187 Wis. 282, 202 N.W. 701; *Ward v. Prospect Manor Corp.*, 188 Wis. 534, 206 N.W. 856."<sup>27</sup>

In holding an oral restriction void, the Court stated in *Florsheim v. Reinberger*:

"No rights in and to real property, nor trust or powers over the same, can be granted by parol. *Rice v. Roberts*, 24 Wis. 461; *Clute v. Carr*, 20 Wis. 531; *Duinneen v. Rich*, 22 Wis. 550; *Brandeis v. Neustadt*, 13 Wis. 142."<sup>28</sup>

It should be noted that the usual factors of estoppel, part performance, or reliance may prevent the application of the Statute of Frauds and make oral restrictions binding.

There are two relevant statutes in Wisconsin. Sec. 240.06 demands that the transfer of any "estate or interest in lands" must be in writing and subscribed by the transferor or his agent.<sup>29</sup> Any attempt to cir-

built on the lot and that was enough to put the buyer on inquiry. Thus, the buyer was held to have constructive notice that the land was incumbered by the mechanics lien because of the physical presence of the house on the lot.

<sup>26</sup> 2 AMERICAN LAW OF PROPERTY §9.25 (1922).

<sup>27</sup> *Fuller v. Town Board*, 193 Wis. 549, at 551, 214 N.W. 324, at 325 (1927).

<sup>28</sup> *Florsheim v. Reinberger*, 173 Wis. 150, at 153, 179 N.W. 793, at 794 (1921).

<sup>29</sup> WIS. STATS. §240.06 (1955). "Conveyance of land, etc., to be in writing. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

cumvent this statute by entering into an executory contract to transfer restrictions in the future is prevented by sec. 240.08.<sup>30</sup> That section states that every contract for the sale of "any interest in lands" must be in writing. Thus, the Statute of Frauds applies to equitable restrictions in Wisconsin.

#### VI. MARKETABILITY

There seems to be little doubt that the existence of equitable restrictions imposed upon a particular area of land will prove to be beneficial to both the buyer and the seller of one of the lots existing therein. Generally, the buyer is desirous of obtaining a residence in a location where he will have some assurance of the continued acceptable surroundings of the neighborhood. On the other hand, the seller realizes this and can use the restrictions as a selling point to make the purchase more attractive to the buyer. Thus, equitable restrictions have the general effect of raising the value and marketability of the land.

In contrast to this analysis, case law has determined that the existence of equitable restrictions will render the title unmerchantable. The courts have not denied the value of the restrictions; in fact, they have even encouraged them. In *Schneider v. Eckhoff* the Court stated:

"While unquestionably the original owners of this property were actuated by selfish motives, which can also be said to large extent with respect to the purchasers, the idea of a general plan whereby each purchaser or owner surrenders an interest or easement in his own property for the benefit of others residing in a particular area or community is highly laudable. It is accordance with the modern and progressive ideas involved in the zoning ordinances. It creates a common community interest. It acts as a check to individual advantage and greed. It should therefore be encouraged, if possible, and not discouraged."<sup>31</sup>

Opposed to this reasoning is the age old reluctance of courts to allow the restriction of the title to realty. That is, the courts have wisely refused to recognize title incumbered with restrictions as marketable title. This writer is in full accord with such reasoning which tends toward a more perfect form of private ownership. If the courts were to take the opposite position and term a title incumbered with various restrictions as marketable, there is the danger that soon all land would be subject to so many restrictions as to effectively destroy the practical aspect of private ownership.

<sup>30</sup> WIS. STATS. §240.08 (1955). "What contracts to be written. Every contract for the leasing for a longer period than one year or for the sale of any lands or interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made or by his lawfully authorized agent."

<sup>31</sup> *Schneider v. Eckhoff*, 188 Wis. 550, at 558, 206 N.W. 838, at 842 (1926).

The recent case of *Lasker v. Patrovsky* is evidence of the Court's position. It is there stated:

" . . . plaintiffs were required to furnish good merchantable title . . . free and clear of all liens or incumbrances."<sup>32</sup>

The Court also held (at p. 598):

"It is contended by the plaintiffs that the title offered is not unmerchantable; that the zoning ordinance and restrictive agreements do not constitute incumbrances under the land. As to the zoning ordinances they are correct. *Miller v. Milwaukee Odd Fellows Temple*, 206 Wis. 547, 240 N.W. 193; *Kend v. Herbert Finance Co.*, 210 Wis. 239, 246 N.W. 311; 55 Am. Jr., Vendor and Purchaser, p. 705, sec. 250. The contrary is true, however, as to the restrictions as to the use of real estate placed thereon by agreement, and which impose more onerous burdens than those imposed by law. 55 Am. Jr., *idem*, p. 702, sec. 246."

In *Genske v. Jensen*<sup>33</sup> the Court went so far as to state that restrictions will render the title unmerchantable even though a court of equity would not enforce the restrictions because of the change in the neighborhood.<sup>34</sup>

Note should be made that a tax lien will render the title unmarketable if the seller covenanted to give title free and clear of all incumbrances.<sup>35</sup> However, the lien must be in existence at the time of the sale if it is to render the title unmarketable.<sup>36</sup>

<sup>32</sup> *Lasker v. Patrovsky*, 264 Wis. 589, at 596, 60 N.W.2d 336, at 340 (1953).

<sup>33</sup> *Genske v. Jensen*, 188 Wis. 17, 205 N.W. 548 (1925).

<sup>34</sup> To the effect that private restrictions as to residence purposes render the title unmerchantable see also: *Neff v. Rubin*, 161 Wis. 511, 154 N.W. 976 (1915); *Goodman v. Kortsch*, 196 Wis. 70, 219 N.W. 354 (1928).

<sup>35</sup> In *Douglass v. Raansom*, 205 Wis. 439, 237 N.W. 260 (1931), the Court held: "The failure to show freedom from tax liens was of itself sufficient to render the title not merchantable."

See also: *Ehnert v. Mews*, 151 Wis. 422, 138 N.W. 1022 (1912), where the Court awarded damages on the theory that a tax lien amounted to a breach of a warranty against incumbrances. It should be noted that in both of these cases the lien existed at the time of the transfer of title.

<sup>36</sup> In *Wiseman v. Ladd*, 209 Wis. 594, 245 N.W. 838 (1932), a tax for public improvements was assessed after passage of title but for work commenced before title passed. The warranty deed read:

" . . . and that the same are free and clear from all incumbrances whatever. . . ."

The Court stated at p. 596 (245 N.W. at 840):

"It is conceded that a covenant against incumbrances if breached at all is breached when the deed is given. It is also conceded that the covenant is one which runs with the land. *Olson v. Lindsay*, 190 Wis. 182, 208 N.W. 891." It was held that the buyer could not recover from the seller the amount of taxes paid by the buyer because the taxes were not actually assessed until after the passage of title. Thus, the covenant against incumbrances was not breached at the time of execution of the deed.

Note, however, that in *Nelson v. Gunderson*, 189 Wis. 139, 207 N.W. 408 (1926), a reassessment of taxes was made after the execution of the deed. In allowing the buyer to recover from the seller the amount of taxes paid, the Court recognized the fact that the reassessment was not in existence at the time of the execution of the deed. It was held, however, that in the case of a reassessment the lien attaches as of the time that it should have been originally assessed. Thus, the seller was bound to reimburse the buyer for

The restrictions imposed by zoning ordinances will not affect the marketability of the title.<sup>37</sup> However, an easement, like an equitable restriction, will violate the covenant against incumbrances and will make the title unmarketable.<sup>38</sup>

Thus, although the restrictions will prove helpful to all parties concerned, care must be taken or the seller will find that his title is unmerchantable.

Normally the question will not arise because of the very fact that, as pointed out above, these restrictions are beneficial to all parties concerned. However, because disagreements do arise, care should be taken by the seller if he is to bind the buyer to the contract. Two factors must be taken into consideration.

First, if there is no mention as to what kind of title the seller warrants, sec. 235.06 of the statutes will apply.<sup>39</sup> It states that if a warranty deed is given, the seller (in the absence of an express provision to the contrary) warrants that the lands "are free from incumbrances." In *Petre v. Slowinski*, the Court held:

" . . . it is well settled that where no provision indicating the character of the title is made in a contract for the sale of real estate, the law implies that the vendor is to convey a marketable title free from incumbrances. 55 Am. Jur., Vendor and Purchaser, p. 619, sec. 149; *Curtis L. & L. Co. v. Interior L. Co.*, 137 Wis. 341, 347, 348, 118 N.W. 853. Respondents are therefore entitled to the statutory warranty deed provided for in sec. 235.06, Stats."<sup>40</sup>

the taxes because of his warranty against incumbrances. Whether the Court would hold the title unmerchantable in the case of a reassessment is very doubtful because of the lack of fault on the part of the seller and because of its unforeseeability. The buyer's remedy would probably be limited to damages in the amount of taxes paid.

<sup>37</sup> In *Miller v. Odd Fellows Temple*, 206 Wis. 547, at 559, 240 N.W. 193, at 199 (1932), the Court held:

"This matter was given very careful consideration by the trial court and it is considered that it correctly held that the restrictions imposed by the zoning ordinance or the laws of the state are not incumbrances within the meaning of the term as used in a contract to convey real estate."

See also *Kend v. Herbert Finance Co.*, 210 Wis. 239, 246 N.W. 311 (1933), where the defendant represented that the "said premises were restricted and set aside for business purposes." Later a zoning ordinance was passed which changed it into a residential area. In not allowing the defendant to cancel the contract the Court held:

"This court has recently held . . . that the restrictions created by a zoning law are not incumbrances." By way of dicta the Court stated that the seller would probably be limited to damages and would not be entitled to specific performance.

Note *Rusch v. Wald*, 202 Wis. 462, 232 N.W. 875 (1930), in which the seller fraudulently represented to the buyer that there were no zoning restrictions. The buyer was allowed recovery on the ground of fraud.

<sup>38</sup> See: *Gensky v. Jensen*, 188 Wis. 17, 205 N.W. 548 (1925); *Hensel v. Witt*, 134 Wis. 55, 113 N.W. 1093 (1908).

<sup>39</sup> Wis. Stats. §235.06 (1955).

<sup>40</sup> *Petre v. Slowinski*, 251 Wis. 478, at 483, 29 N.W.2d 505, at 507 (1912); See also *Neff v. Rubin*, 161 Wis. 511, at 515, 154 N.W. 976, at 979 (1915), where the Court stated:

Following this reasoning it would seem that the buyer would have all the remedies normally afforded him upon breach of contract if incumbrances did exist in violation of the statute.

Second, care should be taken to mention the equitable restrictions in instruments which purport to convey title to land. A standard form pertaining to the conveyance of property will not protect the seller unless he specifically excepts the restrictions in the instrument of conveyance.

For example:<sup>41</sup>

Option — Real Estate:

" . . . and the party of the first part agrees to free said property from all taxes, assessments, liens and charges to the date of such purchase . . . to give a good and marketable title to said property, and to convey the same agreeable to this contract by Deed. . . ."

Offer to Purchase:

"The seller shall, upon payment of the purchase price, convey the property by good and sufficient warranty deed, free and clear of all liens and encumbrances, excepting: . . ."

Land Contract:

" . . . a good and sufficient Warranty Deed, in fee simple, of the premises above described, free and clear of all legal liens and incumbrances, . . ."

Warranty Deed:

" . . . a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever, . . ."

It is true that most of such forms do provide space for the insertion of any exceptions to the title. However, unless the restrictions are specifically excepted from the covenant against incumbrances, the seller may find himself without marketable title.<sup>42</sup>

Marketability (or merchantability) means "good as to the record." There are a number of curative statutes in Wisconsin; but, except for the long range statute which cuts off actions concerning realty, it is doubtful whether any of these statutes will aid a seller who has failed to except the restrictions from his covenant against incumbrances.<sup>43</sup>

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"This Court at any early day held that a contract to convey by 'a good and sufficient warranty deed' entitled the vendee to a warranty deed of the land 'free from all incumbrances.'"

The Court went on to state:

"It is also well established that the restrictions on the title to the lots in question constituted such an incumbrance as to prevent the defendant from giving such a warranty deed as contemplated by the contract."

<sup>41</sup> The following or similar excerpts are normally found in a standard form.

<sup>42</sup> Perhaps a clause as follows could be inserted:

" . . . subject to the restrictions and incumbrances of record."

<sup>43</sup> For the Wisconsin curative statutes see WIS. STATS. (1955):

§235.18. If the instrument is unsealed and not recorded it is cured in 10 years and is held "to have been entitled to record."

## VII. INVOLUNTARY ALIENATION

A question arises as to what happens to the rights of the parties when the estate burdened with the restriction is subject to involuntary alienation. That is, what happens to the restriction when the property is sold at a tax sale, and should the holder of the restriction be compensated when the land is taken over by the municipality under the power of eminent domain?

In the case of a tax sale clearly no problem arises as to the owner of the burdened estate; he loses his land entirely. It has been held, however, that the land remains burdened with the restriction. The American Law of Property states the following rule:

"In those states where the taxes are assessed only on the estate of the burdened land owner, and the tax sale is a proceeding *in personam* so that the grantee under the tax deed acquires only derivative title, the equitable servitude against the land is clearly not affected by the tax sale and the grantee under the tax deed takes the land burdened by the equitable restriction."<sup>44</sup>

This position was adopted by the Wisconsin Court in *Doherty v. Rice*. In that case the Court stated:

"The tax deed only cut off the interest in the land that were taxed against it. The interests in the land under restrictions not having been taxed against the land, but against the lands to which they were appurtenant, were not cut off. The tax deed left those interests unaffected and conveyed the land subject to them."<sup>45</sup>

On the question of whether compensation should be paid to the holder of a restriction when the burdened property is taken under eminent domain the American Law of Property states:

§235.19. If the instrument is unsealed or improperly recorded (recorded but unsealed and not witnessed), it is cured 10 years from date of execution.

§235.20. If the instrument is recorded but unwitnessed, unacknowledged, unsealed, executed without de jure corporate authority, or otherwise defectively executed, it is cured 10 years from the date that it was improperly accepted for record.

§235.255(2). This section cures instruments executed defectively by persons engaged in World War II service at the time of execution.

§§235.46 & 235.69. These sections cure defects respecting possession, descent, heirship, date of birth, death, marriage, identity or marital status of parties to conveyances, and identification of ambiguously identified plats of subdivisions.

See also §§235.55, 235.59, 235.60, 235.61, 235.62, 235.63, 235.64, and 235.65.

For the long range termination statute concerning actions dealing with realty see: §330.15.

<sup>44</sup> 2 AMERICAN LAW OF PROPERTY §9.40 (1952).

<sup>45</sup> *Doherty v. Rice*, 240 Wis. 389, at 402, 3 N.W.2d 734, at 740 (1942). The Court reasoned that a restrictive covenant was similar to an equitable servitude which, in turn, was similar to a negative easement. Thus, since easements are still valid after a tax deed (see: *Union Falls Power Co. v. Marinette County*, 238 Wis. 134, 298 N.W. 598 (1941)), so should a restriction be valid. This indicates that Wisconsin applies the law of property (easements) rather than the law of contracts to equitable restrictions.



" . . . the better reasoned authorities have held that the extinguishment of an equitable servitude under the power of eminent domain is the taking of private property for public use for which compensation must be paid."<sup>46</sup>

The law is contra in Wisconsin. It is true that the Court recognizes a restriction to be a property right. However, it applies the theory that "the whole is equal to the sum of its parts" and gives an award equal to the value of the land taken. As was pointed out in *Fuller v. Town Board*:

"The only damages, however, which the town board is required or authorized to assess are those damages sustained by a person 'through whose land any highway shall be laid out.'"<sup>47</sup>  
[by statute, sec. 80.09]

Thus, by statute only the value of the land is required to be paid over. The remedy of the holders of the restrictions is provided for in secs. 32.10 and 32.13 of the statutes.<sup>48</sup> They may apply for compensation for such restrictions in a proper proceeding therein provided. However, that compensation must be paid from the original amount paid for the land (which was equal to the value of the land). This system is basically unsound. Assume, for example, that the restrictions in the hands of each of ten holders thereof is valued at \$100. What would their value be if there were twenty holders? Would the Court reduce the amount of the compensation paid to the owner by \$1,000 merely because there were twenty homes with similar setback restrictions instead of ten? Or would the Court cut the value of each restriction to \$50? It would seem more reasonable to assess separately the value of property and property rights taken and to pay each accordingly.

#### VIII. CONSTITUTIONALITY

The extent to which equitable restrictions can be used to control the use of land is as broad as the right of private contract. The only notable limitation has been in the area of racial restrictions. The landmark case of *Shelley v. Kraemer* declared that although such restrictions are not violative of the Fourteenth Amendment of the United States Constitution, they are unenforceable in court.<sup>49</sup> Thus, for all practical purposes, racial restrictions are of no legal effect.

This writer believes that some further limitation on these restrictions must be considered. If restrictions are not limited, there is nothing to prevent the developer from keeping all use rights in land

<sup>46</sup> 2 AMERICAN LAW OF PROPERTY §9.40 (1952).

<sup>47</sup> *Fuller v. Town Board*, 193 Wis. 549, 214 N.W. 324 (1927). It should be noted that in this case the Court recognized that an equitable restriction is a property right.

<sup>48</sup> WIS. STATS. §§32.10 & 32.13 (1955).

<sup>49</sup> *Shelley v. Kramer*, 334 U.S. 1 (1948). The *Shelley* case overrules *Doherty v. Rice*, 240 Wis. 389, 3 N.W.2d 734 (1942), which held valid a restriction not permitting sale to or occupancy by a non-Caucasian.

except those which he is willing to give to the "land owner." Nor is the individual free to avoid this result, because nearly all residential land today is subject to restrictions. The difficulty arises as to how one can interfere with the right of private contract.

The simplest method would be for the courts to refuse to enforce those restrictions which go to the extreme in controlling the use of land, because they deprive the owner of his property rights.

A second method of limiting equitable restrictions would be by passage of a state statute. Here, the question of impairment of contract is encountered. However, if it can be shown that the public good is threatened, as it certainly is by placing undue restrictions on private ownership, then the right of private contract must yield.<sup>50</sup> The difficulty would be in attempting to determine the standards to which restrictions should be limited. It seems doubtful that they could be limited more strictly than public zoning which has in some cases already been justified when based upon aesthetics alone. Thus, perhaps restrictions could probably be more effectively confined by judicial determination rather than by legislative action.

#### IX. ENFORCEMENT

Because of the rapid expansion which has marked this area of the law, and because of the equitable, rather intangible rules which are applied, it is difficult to set down well defined lines as to who may enforce an equitable restriction and the remedies available for breach of such restriction. One noted author has even stated that we must wait until a more enlightened law of covenants is developed.<sup>51</sup>

Assuming that a general plan is in effect, the general rule as to who may enforce these restrictions is summarized by Tiffany when it is stated:

"The cases are to the effect that when such a general plan exists, any one who purchases one of the lots with knowledge of the plan may assert the restrictions involved therein as against any other purchaser."<sup>52</sup>

This rule is well established in Wisconsin law.<sup>53</sup> In *Mueller v. Schier* the Court held:

<sup>50</sup> See for example: *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283 (1932), where a Minnesota statute requiring that the contract of sale of certain farm machinery must contain a warranty clause was held valid. The court there emphasized the fact that farming was of vital importance, and that the farmers by necessity were forced to buy this machinery. In analogy to restrictions, private ownership of land is of vital importance, and because all land is restricted the buyer is forced to buy restricted land.

<sup>51</sup> CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 159 (2d ed. 1947).

<sup>52</sup> 3 TIFFANY, REAL PROPERTY §867 (3d ed. 1939).

<sup>53</sup> See: *Doherty v. Rice*, 240 Wis. 389, 3 N.W.2d 734 (1942). In *Burden v. Doucette*, 240 Wis. 230, at 236, 2 N.W.2d 204, at 207 (1942), the Court held: "It is well settled that when restrictive covenants are entered into with the design of carrying out a general scheme for the improvement and development of property they are enforceable by any grantee having notice. In such

"It is well settled that when restrictive covenants are entered into with the design of carrying out a general scheme for the improvement of property they are enforceable by any grantee against any other grantee having notice."<sup>54</sup>

A question arises as to whether equitable restrictions may exist without showing some plan of development. The function of a plan or scheme is to more readily show the intention of the parties to bind the land, itself. However, if this required intent can be shown without reference to a plan, there seems to be no reason why it should not be binding between the parties.<sup>55</sup> Several reasons can be advanced why the cases involving equitable restrictions deal with plans of development. First, if there are only two parties involved, the covenantor and the covenantee, the courts often find a covenant at law that runs with the land and decide the case upon that ground. However, when one purchaser sues another purchaser to enforce a restriction, three or more persons and two or more lots are involved, which facts point to the existence of a plan. The same is true if the developer sues one purchaser on behalf of another purchaser. Second, historically equitable restrictions have dealt with land development plans. There is little basis to extend their application beyond such developments. Finally, in accord with their reluctance to restrict the use of land, courts would probably demand some sort of plan as evidence of the necessary intent to bind the land.

Tiffany not only suggests the elimination of the necessity of a plan, but also states that a stranger to the entire agreement may be able to enforce the restrictions so long as he owns land neighboring the burdened land. It is stated:

"There are occasional dicta to the effect that, even in the absence of a general plan, a restrictive agreement may be en-

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a case there is a consideration and mutuality of covenant binding upon each." *Stein v. Endres Home Builders, Inc.*, 228 Wis. 620, at 626, 280 N.W. 316, at 318 (1938) and cases cited.

<sup>54</sup> *Meuller v. Schier*, 189 Wis. 70, at 78, 205 N.W. 912, at 916 (1926).

<sup>55</sup> In a New York case, *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, at 134, 159 N.E. 886, at 887 (1928), the Court held that no plan was required. It stated:

"It is true that in most cases where a grantee of one parcel of land has been permitted to enforce a restriction imposed upon the subsequent conveyance of another parcel to another grantee, it appears that both parcels were part of a larger tract, and the restriction was imposed to carry out a general scheme of development of the whole tract . . . . In some cases there are expressions in the opinions which standing alone might seem to indicate that the right of a prior grantee of one parcel to enforce a restriction imposed upon a subsequent conveyance of another parcel by the same grantor is limited to cases where both parcels were embraced in a general plan for development of a larger tract. A critical examination of these opinions will demonstrate that these considerations have been regarded as decisive only where on the face of the subsequent deed no covenant or restrictions is found in favor of prior grantees or where the action has been brought in jurisdictions where courts have been compelled to create an exception to a general rule prevailing there that a third party may not enforce a contract made for his benefit."

forced by one who is neither the original promisee, nor a successor in interest of the latter, provided he owned neighboring land at the time of the agreement, and it was the intention that he should enjoy the benefit thereof."<sup>56</sup>

This reasoning points to the theory of a third party beneficiary contract. We then confront the problems discussed above as to whether the law of property or the law of contracts should apply to equitable restrictions. Since Wisconsin has followed the property theory, it is very doubtful whether a stranger will be able to enforce these restrictions. Furthermore, in *Kramer v. Nelson* the Court held that similar restrictions imposed on lots added to the tract subsequent to the plaintiff's purchase do not inure to the benefit of the plaintiff.<sup>57</sup>

It is clear that any purchaser may enforce an equitable restriction against any other purchaser. The theories upon which a subsequent purchaser may sue a prior purchaser are fairly reasonable. If the jurisdiction follows the contract theory, then the subsequent purchaser may sue on the basis of an assignment of contractual rights from the original owner. The trouble with this analysis is that it is all a legal fiction; there is actually no assignment. If the property theory is applied, the benefit attached to the land of the grantor at the time of the prior purchase, and such benefit merely passed to the subsequent purchaser as appurtenant to the land.

When we examine the theories by which the prior purchaser may enforce the restrictions against a subsequent purchaser, we wander further into the realm of speculation. Three theories have been advanced. First, the original owner may be treated as a trustee of the right to enforce the restriction against the subsequent purchasers when the other lots are sold. Such theory collapses, however, when it is realized that once the original owner sells all of the lots, he is no longer able to enforce the restrictions as trustee. Second, the third party beneficiary contract is called on again to justify the application of contract law to equitable restrictions. That is, the prior purchaser is considered the beneficiary of the contract made between the developer and the subsequent purchaser. The difficulty with this theory is that it is impossible to determine who the beneficiaries are. They may be all the lot owners in the neighborhood, regardless of whether they were prior purchasers from the developer or not. This is an explanation of the statement quoted above from Tiffany to the effect that even a complete stranger who happens to live nearby may be able to enforce the restriction. The Restatement of Property has advanced this view, which is contrary to the more reasonable majority view of applying property

<sup>56</sup> 3 TIFFANY, REAL PROPERTY §866 (3d ed. 1939). Tiffany cites *Perkins v. Young*, 266 Wis. 33, 62 N.W.2d 435 (1953), in support of the quoted statement. However, in the *Perkins* case there was a plan established.

<sup>57</sup> See: *Kramer v. Nelson*, 189 Wis. 560, 208 N.W. 252 (1926).

law to equitable restrictions.<sup>58</sup> Finally, under property law, the prior purchaser may enforce the restriction against a subsequent purchaser because of his reliance and expectation that all the lots are bound by the restrictions. An implied reciprocal servitude is created at the time of the prior purchase.<sup>59</sup>

Further complications arise when there is a resubdivision of the land. The problem is concisely stated in the American Law of Property:

"Each traces his title in his portion of the resubdivided land back to the original promisor. Thus, the lot of each is subject to the same equitable servitude. The problem then arises as to whether they are also entitled to the benefit of this same equitable servitude as against each other. Under either the property theory or the contract theory of enforcement, the complainant must trace his title back to the promisee, while the defendant's title must come from the promisor. Under the property theory, the benefit must have passed to the complainant as an appurtenance to the land of the promisee. Likewise, under the contract theory, the contract rights must have passed from the promisee to the complainant by implied assignment with the benefitted land."<sup>60</sup>

Again, the trust theory has been used in an attempt to justify the suit. The promisee is to be treated as trustee of the benefit, and the subsequent purchaser as the beneficiary. However, this approach has had little recognition. The third party beneficiary contract has also been advocated. However, it does not seem reasonable that the original covenantor and covenantee could intend to benefit a later unknown purchaser from the covenantor, especially if the covenantor does not decide to sell the land until years later. A third solution has been to set up a fiction that new restrictions are created with each new resubdivision.<sup>61</sup> It would seem more realistic to this writer to simply say that at the time of the original purchase the benefit and the burden of the restriction became appurtenant to all of the land. Thus, if A's lot were later split into lot 1 and lot 2, the benefit to enforce the restrictions would still be appurtenant to the land, and every part thereof, whether divided or not. This is the result reached by the Wisconsin Court in *Boyd v. Roberts*.<sup>62</sup>

The fact that equitable restrictions have been imposed upon the land does not mean that the land must remain subject only to those

<sup>58</sup> RESTATEMENT, PROPERTY §541 (1944).

<sup>59</sup> Although the Wisconsin Court has seldom, if ever, used the term "implied reciprocal servitude," its adherence to the property theory indicates that it follows this last theory.

<sup>60</sup> 2 AMERICAN LAW OF PROPERTY §9.34 (1952).

<sup>61</sup> RESTATEMENT, PROPERTY §527, comment c (1944).

<sup>62</sup> *Boyd v. Roberts*, 131 Wis. 659, 111 N.W. 701 (1907). It should be noted that the reasoning in this case is not in accord with the sentence quoted from the American Law of Property, above, to the effect that "under the property theory, the benefit must have passed to the complainant as an appurtenance to the land of the promisee."

restrictions. That is, if *A* buys lot 1 today under an agreement that the entire tract will be subject to restrictions *a* and *b*, the developer may sell lots 2 and 3 subject to restrictions *a*, *b*, *c* and *d* tomorrow. However, restrictions *c* and *d* will not inure to *A*'s benefit (he will not be able to sue to enforce them) because they were not in existence at the time of his purchase. Thus, the number of restrictions on the unsold lots may be increased but not decreased. If, however, there be a specific prohibition against the addition of further restrictions on the tract in the deed to *A*, then the developer would probably be bound by such promise; because the prohibition, itself, would act as a restriction which should be binding on both the grantor and the grantee.

May the benefit of the restriction be held in gross? In drawing an analogy to the rule governing easements, the benefit of a restriction cannot be held in gross either in England or in the majority of the states of the United States.<sup>63</sup> However, the benefit of an easement may be held in gross in Wisconsin. Thus, since Wisconsin generally applies the law of easements to restrictions, it is arguable that the benefit of a restriction is capable of being held in gross.

If equitable restrictions are found to exist, each lot owner holds the benefit of the restrictions on the other lots as appurtenant to his own lot. The only person who can hold the restriction in gross is the developer, and his so holding would not affect the fact that the lot owners hold the benefit appurtenant. If the courts go so far as to eliminate the requirement of a general plan or scheme, and the "developer" only owned the one lot which he sold subject to the restrictions, then the developer, alone, would hold the benefit in gross. However, this situation violates the historical development of equitable restrictions, and is so similar to legal covenants being made with the developer where the covenants run with the land that the courts would probably judge them as legal covenants rather than as equitable restrictions.

In enforcing restrictions the plaintiff need not show personal damage to himself so long as the purpose of the agreement is still possible of performance.<sup>64</sup> The plaintiff's normal remedy in Wisconsin is in-

<sup>63</sup> The courts are split on whether the benefit of an equitable restriction may be held in gross. In those jurisdictions where easements in gross have not been recognized, the developer may still hold the benefit of a restriction in gross "... insofar as he is under a legal obligation to see that the promise is performed." *RESTATEMENT, PROPERTY* §§549, 550 (1944). However, in most cases he is not permitted to transfer such benefit.

In *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938), the corporate developer was able to hold the benefit in gross on a strained theory of constructive ownership. The corporation existed for the benefit of the lot owners, so that the lot owners were said to be the true holders of the benefit.

<sup>64</sup> 2 *AMERICAN LAW OF PROPERTY* §9.24 (1952). It should be noted that if the jurisdiction demands that the plaintiff show damage before suit for violation of a restriction will lie, then, in all probability, the developer would not be

junction, although if this is not equitable, damages will be awarded. If, however, the jurisdiction applies contract law to equitable restrictions, then logically the normal remedy would be damages at law. However, if the damages prove inadequate, an injunction will issue. It seems more reasonable to apply an injunction in the first instance because as a practical matter it is the remedy for the enforcement of equitable restrictions.

#### X. DEFENSES TO ENFORCEMENT

Text writers speak of several different defenses to the enforcement of an equitable restriction.<sup>65</sup> However, an analysis of the defenses indicates that many of the so-called defenses are merely ways in which the restriction has been terminated, so that there has been a termination; and consequently there is no need for a defense. Such factors as a change in the physical conditions of the locality and abandonment actually terminate the restriction (as will be seen below) and, of course, prevent its enforcement. The three defenses most commonly alleged are release, waiver and acquiescence.<sup>66</sup> Because of the factual similarity between waiver and acquiescence, they shall be treated together.

The holders of the benefit of the restriction can expressly release the burdened land from the restriction. However, the comparison with the release of a covenant should be noted. A covenant may be released by the covenantee, alone; because he is the sole person holding the benefit. However, since the benefit of a restriction is appurtenant to all the other lots in that tract, the consent of all the lot owners is necessary before one can obtain a release.<sup>67</sup> This is a significant drawback of equitable restrictions. Once imposed, they lack the flexibility and ease of release which is often required by changes in the needs of the area. For this reason a developer should consider the possibility of creating individual covenants which run with the land, and thereby retain the ability to easily release or change them instead of binding the land so securely by restrictions that the consent of all the land owners is necessary before he can effect such change or release.<sup>68</sup>

able to hold the benefit in gross; because he would have difficulty showing damage to his land if he were not a land owner.

<sup>65</sup> See: 2 AMERICAN LAW OF PROPERTY §§9.38, 9.39 (1952).

<sup>66</sup> Of course the equitable defenses of "clean hands" and "laches" are available because equitable restrictions are enforced in a court of equity. However, these defenses are seldom effective. See 2 AMERICAN LAW OF PROPERTY §9.38 (1952), where it is stated that the defense that the plaintiff does not have "clean hands" will only be effective if the plaintiff's violation is of the same kind and degree of that of the defendant. It goes on to state that laches, alone, will seldom be an acceptable defense. Something more, such as acquiescence, is normally required.

<sup>67</sup> 3 TIFFANY, REAL PROPERTY §872 (3d ed. 1939). *Vikes v. Pederson*, 247 Wis. 288, 19 N.W.2d 176 (1944). See also: *Genske v. Jensen*, 188 Wis. 17, 205 N.W. 548 (1925), where the Court held that restrictions imposed on property by deeds from the original grantor are not released by a quitclaim deed from him where no release is obtained from the other adjacent lot owners in whom is vested the right to enforce the restrictions.

<sup>68</sup> In comparing a covenant with a restriction, it is true that a covenant is more

Since the entire theory of restrictions had its origin in equity, it is only fitting that a defense to its enforcement should be an equitable defense. The rule is that if one continually acquiesces in violations of the restriction equity will not allow him to later complain of a similar violation.<sup>69</sup>

Acquiescence in minor violations is not a defense to a major violation.<sup>70</sup> Furthermore, the prior violations must directly affect and be physically near the plaintiff's land before this defense is valid. Here, a distinction is made between the developer and the lot owner. In *Ward v. Prospect Manor Corp.*, the Court held:

"Modern authority has made a distinction between the rights of a proprietor in such respect when prior violations have been acquiesced in and the rights of an individual lot owner, such distinction arising from the fact that the proprietor is or may be directly interested in violations of such covenants upon any part of the entire tract, and acquiescence on his part may appropriately deny to him the equitable right to enforce the covenant; but a violation of a restrictive covenant at a point on a tract distant from the lot of an individual lot owner may be of no interest whatever to such an owner and cannot appropriately call for affirmative action on his part."<sup>71</sup>

In the *Ward* case fifteen duplexes had been built in violation of the restriction which limited the area to "only residences," and one of the duplexes was next door to the plaintiff's lot. Yet, the court held that there had been no waiver by the plaintiff of his right to enforce the restriction.<sup>72</sup> In dicta the Court went so far as to nearly eliminate this defense entirely.<sup>73</sup>

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flexible when it comes to changes. However, it must also be kept in mind that covenants offer no real protection to the buyer. That is, the buyer, himself, cannot enforce the covenant as against the other lot owners. He must rely upon the developer's good faith to enforce similar covenants in the other deeds.

<sup>69</sup> Waiver and acquiescence are treated as the same defense for purpose of this discussion.

<sup>70</sup> See: *Mueller v. Schier*, 189 Wis. 70, 205 N.W. 912 (1926).

<sup>71</sup> *Ward v. Prospect Manor Corp.*, 188 Wis. 534 at 539, 206 N.W. 856, at 858 (1926). See also: 3 *TIFFANY, REAL PROPERTY* §874 (3rd ed. 1939), where it is stated:

"... though his failure to object to a violation by the owner of one lot does not affect his right to object to a violation by another, if the former violation, by reason of the distance of the lot, or for some other reason, did not affect the enjoyment of his lot." *Burden v. Doucette*, 240 Wis. 230, 2 N.W.2d 204 (1942).

<sup>72</sup> It is true that in the *Ward* case the duplex which was built next door to the plaintiff's lot was in reality a single family residence which was remodeled into a duplex, so that the exterior appearance did not drastically affect the neighborhood. The Court may have given this fact considerable consideration in finding that there had been no waiver on the part of the plaintiff.

<sup>73</sup> In *Ward v. Prospect Manor Corp.*, 188 Wis. 534, at 543, 206 N.W. 856, at 860 (1926), the Court stated:

"The Supreme Court of Massachusetts makes the square declaration 'that a plaintiff is not prevented from obtaining relief by the fact that he has not objected to a violation of a restriction by someone in the neighborhood



## XI. TERMINATION

Although there are many ways to terminate an equitable restriction, only the major methods will be considered in this discussion.<sup>74</sup> Since most restrictions contain a termination clause, the simplest method of termination is by use of such provisions as are expressly set forth in the instrument creating the restrictions.<sup>75</sup> However, in the absence of such a provision, how may a restriction be terminated?

First, one may obtain the consent of all the lot owners. This is often the impractical method forced upon a later owner when the drafter neglects to insert a termination clause in the original instrument. Second, if one person becomes owner of all the land restricted, presumably the doctrine of merger would eliminate the restrictions. However, the two methods of termination which most often lead the parties to court are a change in the neighborhood conditions and abandonment.

The traditional definition of a termination by a change in the conditions of the neighborhood has been handed down case by case and is found in the fairly recent case of *Burden v. Doucette*:

"In *Ward v. Propect Manor Corp.*, 188 Wis. 534, 538, 206 N.W. 856, the court quotes the English rule as found in *Peek v. Matthews*, L.R. 3 Eq. 515, 517, as follows:

'If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighborhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, *then the covenantee is not allowed to come into court for the purpose of merely harassing and annoying some particular man where the court could see he was not doing it bona fide for the purpose of effecting the object for which the covenant was originally entered into.*'"<sup>76</sup>

Tiffany also recognizes this change as a means of terminating a restriction.<sup>77</sup> However, Tiffany applies the law of contracts to restrictions. It seems unreasonable to this writer that a contract should come to an end merely because of a change in the conditions of the neighborhood. It is true that if someone violated a restriction after such change in conditions, a court of equity may not issue an injunc-

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other than the defendant.' *Bacon v. Sandberg*, 179 Mass. 396, 60 N.E. 936. While the necessities of this case do not require us to take such a broad ground, we query whether the logic of the situation does not lead us to that result."

<sup>74</sup> In *CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND* 163 (2d ed. 1947), the author states that all the rules governing the termination of easements and profits should also apply to equitable restrictions.

<sup>75</sup> These termination clauses are treated at length in that section of this paper dealing with drafting problems.

<sup>76</sup> *Burden v. Doucette*, 240 Wis. 230, at 235, at 2 N.W.2d 204, at 209 (1942).

<sup>77</sup> 3 *TIFFANY, REAL PROPERTY* §875 (3d ed. 1939).

tion, but there seems to be no reason why damages could not be awarded on the basis of a technical breach of the covenant. It would seem that one of the great drawbacks of applying the contract theory to restrictions would be the fact that the covenant would constitute a cloud upon the title even after a change of conditions in the neighborhood. It should be noted that if the law of property is applied, no such difficulty is encountered.

Abandonment if factually akin to a change in the condition of the neighborhood. The Court laid down the test to be applied in Wisconsin when it stated:

"If the defendants had bought their lots and built their residence knowing that the restrictions were generally disregarded in their neighborhood, if, to their knowledge, business buildings had been erected in their vicinity materially encroaching on the strip in question, if, in short, they could see that the whole situation had been so changed as to result in abandonment of the restriction, a very different question would be presented. In such a case a court of equity might well refuse to grant an injunction which would be unjust to others."<sup>78</sup>

Generally, it has been very difficult to convince the Court that the plan has been abandoned. In *Ward v. Prospect Manor Corp.*, fifteen duplexes and ninety residences were built in an area restricted to residences; yet, the court held that this was not such a change as to amount to abandonment.<sup>79</sup> Furthermore, one must show abandonment on the part of all the lot owners. In *Goodman v. Kortsch*, the land was limited to a "private residence or dwelling." The defendant claimed abandonment because:

"... said subdivision contains 64 lots, upon which have been erected 145 buildings; that among the buildings so erected, 64 are duplex flat buildings; 1 three-apartment building; 3 four-apartment buildings; 1 six-apartment building; and 2 twelve-apartment buildings."<sup>80</sup>

In holding that there was no abandonment the Court said: (at p. 75)

"Every lot owner who has not himself become estopped by reason of his acts to assert his rights under these negative easements must be dealt with before it can be said that there has been an abandonment of the easement."

Statutory termination of equitable restrictions in Wisconsin is provided in sec. 330.15.<sup>81</sup> Generally, if the instrument has not been recorded, no suit may be maintained upon such instrument more than

<sup>78</sup> *Mueller v. Schier*, 189 Wis. 70, 205 N.W. 912 (1926). The Court also noted in that case that giving an easement to the city to build a road does not amount to an abandonment of the restriction dealing with the building line.

<sup>79</sup> *Ward v. Prospect Manor Corp.*, 188 Wis. 534, 206 N.W. 856 (1926).

<sup>80</sup> *Goodman v. Kortsch*, 196 Wis. 70, 219 N.W. 354 (1928).

<sup>81</sup> WIS. STATS. §330.15 (1955).

thirty years after the date of its execution. However, if the instrument is recorded, such actions will not be barred for a period of sixty years from the date of recording.

## XII. STATUTORY REGULATION OF LAND SUBDIVISION

Chapter 236 of the Wisconsin Statutes regulates certain land subdivisions.<sup>82</sup> (It should be noted that this chapter was subject to substantial change in 1955.)<sup>83</sup> The basis for such regulation is the same as the basis for zoning laws, namely through use of the police power. The Wisconsin laws require approval and recordation of certain divisions of land with corresponding penalties for failure of compliance.

The application of the chapter is limited to those subdivisions which come within the following definition:

"Section 236.02(7) Subdivision is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development where:

- (a) The act of division creates 5 or more parcels or building sites of 1 and  $\frac{1}{2}$  acres each or less in area; or
- (b) Five or more parcels or building sites of 1 and  $\frac{1}{2}$  acres each or less in area are created by successive divisions within a period of five years."

The application of this statute is limited to a normal subdivision where a number of average sized residential lots are involved. However, several factors should be noted. First, any lot which exceeds one and one-half acres is not covered.<sup>84</sup> Thus, sale of larger lots (especially divisions for industrial centers) escapes this statutory regulation. Avoidance of the statute could also be accomplished by selling only four lots every five years and renting the rest until their turn for sale. Perhaps, some type of option to purchase, exercisable only after a certain number of years have elapsed, in the lease with the rental payments applied toward the purchase price would accomplish the same purpose. However, it seems unlikely that such statutory avoidance schemes will be employed because restrictions generally improve the attractiveness and value of the land—a factor which is favorable to both the seller and the buyer.

Secs. 236.03 through 236.12 require that the subdivision plats be

<sup>82</sup> All statutory references in this subsection are to WIS. STATS. (1955), as amended by the 1957 Legislature.

<sup>83</sup> The Court noted this change in *Alan Realty Co. v. Fair Deal Investment Co.*, 271 Wis. 336, at 341, 73 N.W.2d 517, at 519 (1955). It stated:

"As a matter of interest only, we call attention to the fact that by ch. 624, Laws of 1953, the legislative counsel was directed to study the matter of the subdivision and platting of lands and to report its findings and recommendations to the 1955 legislature. As a result of a careful study by a committee of the council, and with the assistance of an advisory committee representing the many groups interested in the subject, the 1955 legislature, by ch. 570, Laws of 1955, repealed and re-created ch. 236, Stats."

<sup>84</sup> See: 25 A. G. 520 where this conclusion was reached under a similar provision then in effect.

surveyed and approved. The standard which limits the power of the approval boards is found in sec. 236.13: (Wis. Stats. 1955)

"236.13 Basis for approval

(1) Approval of the preliminary or final plat shall be conditioned upon compliance with:

- (a) The provisions of this chapter;
- (b) Any municipal, town or county ordinance;
- (c) Any local master plan or official map;
- (d) The rules of the state board of health . . . ;
- (e) The rules of the state highway commission . . . ;

". . . ."

The section specifically limits the power of the board to this standard, sec. 236.13(2)(a), and provides for appeal to the courts, sec. 236.13(3). The main importance of this section lies in the first limitation, sec. 236.13(1)(a), because all of the other limitations will apply independently of this chapter or of the fact that a subdivision is involved. The provisions referred to in sec. 236.13(1)(a) are found in sec. 236.16. Generally, that section provides for a minimum lot width and area (with slight variances depending on population) and for a minimum street width. In comparison to the detailed restrictions put into private contracts, and even in comparison to the local zoning ordinances (which are recognized in sec. 236.45 and authorized by sec. 59.97), these restrictions become nearly meaningless.

The final plat must be recorded in the register of deeds office, sec. 236.25. The "teeth" of this statute are found in sec. 236.31. First, unless the contract of sale is contingent upon the recordation of the plat, a person who sells land in violation of this statute may be punished, sec. 236.31(1). Then, any municipality, town or county may enjoin the violation of this chapter, sec. 236.31(2). The contract of sale, itself, is binding on the seller but voidable by the purchaser within one year after its execution, sec. 236.31(3). At first glance it would seem that this chapter would eliminate all consideration of the rules governing the priority of rights as established by the recording acts because of the required recordation under this chapter. However, such is not the case. First, as is seen above, the application of this chapter is limited to certain limited subdivisions. Then, even if the chapter does apply, and is violated by failure to record, the priority of recordation must be considered if the purchaser determines to hold the seller to the contract.

Secs. 236.40 through 236.44 provide for vacating and altering plats by court order upon proper notice and hearing.

Chapter 236, then, serves as a minimal regulation over certain lot divisions.

However, upon analysis it becomes clear that this chapter is completely independent from the equitable restrictions which are imposed

on most subdivisions. It is true that the statute serves as a minimum, but most private land restrictions will go far beyond that minimum. Furthermore, one of the main effects of the statute is to put the approved plat on record. Yet, there is no requirement that the equitable restrictions to be imposed need be recorded (although they are almost always recorded). Thus, the essential factor of constructive notice of the equitable restrictions is not secured by this statute, and the recording acts are still in full force as regards such restrictions.

The fact that the restrictions are independent from this statute is seen from the case of *In re Henry Cooper, Inc.* In that case the argument was made that the vacation of the plat involved would adversely affect the restrictions which had been imposed upon the land. Concerning this the Court stated:

"The vacation of a plat merely frees the land from certain easements — the title of the land remains exactly where it was before. If the lands within the plat were subject to a servitude before its vacation, we find nothing to indicate that they are not subject to the same servitude after the vacation."<sup>85</sup>

Thus, although most equitable restrictions are recorded, Chapter 236, itself, is of little importance in their validity and function.

### XIII. DRAFTING PROBLEMS

The Wisconsin court has declared that plans of private zoning are to be termed "highly laudable."<sup>86</sup> However, in construing a set of restrictions on the use of land, any doubt is resolved against the restriction and in favor of the free use of the land. (This construction is often of little compensation to the "landowner" who finds that he cannot even plant a new bush in his backyard because of some valid, binding restriction.) The Court's position is stated in *State ex rel. Bollenbeck v. Shorewood Hills*:

"Upon the foregoing authorities, it must be held that building restrictions, whether contained in deeds or ordinances, must be strictly construed."<sup>87</sup>

In *Peterson v. Gales* the Court held:

"It is well settled that such covenants are strictly construed in favor of the free use of the premises for all lawful purposes."<sup>88</sup>

For purposes of analyzing the various drafting problems, six recent sets of restrictions, all concerning the development of land in and around Milwaukee, will be considered. In order to expedite their presentation, they will simply be referred to as follows: (1) Fox Point,

<sup>85</sup> *In re Henry Cooper, Inc.*, 240 Wis. 377, at 389, 2 N.W.2d 866, at 872 (1942).

<sup>86</sup> See: *Schneider v. Eckhoff*, 188 Wis. 550, 558, 206 N.W. 838 (1926).

<sup>87</sup> *State ex rel. Bollenbeck v. Shorewood Hills*, 237 Wis. 501, at 508, 297 N.W. 568, at 570 (1941).

<sup>88</sup> *Peterson v. Gales*, 191 Wis. 137, at 139, 210 N.W. 407, at 408 (1926).

1956; (2) Greendale, 1955; (3) Greenfield, 1954; (4) Town of Lake, 1951; (5) Country Club Highlands, 1950; and (6) Colonial Highlands, 1928 (the effective respective dates follows the name of each). Thus, when speaking of plat (1), reference is made to the Fox Point set of restrictions.

There is a marked similarity between plats (1), (3) and (4); as there is also a marked similarity between plats (2), (5) and (6). For these reasons (and also so as not overburden the reader) only plats (1) and (2) have been reproduced in full in the appendix to this paper, and reference will be primarily directed toward those two plats. The remaining four plats are fully identified in the appendix, but the individual restrictions contained therein will only appear when their variance from plats (1) and (2) is worthy of note.

There are basically two different ways by which the use of land may be restricted when developing a new area. First, this may be done by covenants at law which run with the land. Second, equitable restrictions may be used. Before we proceed to the problems of drafting, a brief comparison between the effects of these two types of restrictions may clarify the discussion.

A covenant at law is normally created for the benefit of the covenantee, personally. This means that the purchaser may be compelled by the covenantee to comply with the covenant. The purchaser, in turn, has no true protection for several reasons. First, the covenantee is usually not bound to put similar restrictions in the deeds to the other lots which he will later sell. Thus, the purchaser must rely on the good faith of the seller to insert the covenants in the other deeds and maintain the plan of development which the purchaser believes he has secured. Second, even if the developer (seller) does insert similar covenants in the later deeds, no purchaser has a right to enforce those covenants against another purchaser because his contract is with the developer, and not with the other purchasers. A typical restriction which creates this situation is as follows:

"It is hereby agreed by and between both of said parties that the premises are to be used only for residential purposes."<sup>89</sup>

It should be noted that the seller is in no way bound as to the other lands that he owns. The purchaser must rely on the seller to see to it that the other lots are subject to similar covenants; and he must rely on the seller for the enforcement of those covenants once they have been inserted.

Under certain circumstances the benefit of a covenant will run with the land along with the burden. Thus, in such cases the seller's

<sup>89</sup> This clause was the subject matter of suit in *Clark v. Guy Drews Post of American Legion No. 88*, Department of Wisconsin, 247 Wis. 48, 18 N.W.2d 322 (1944). The Court held that it was merely a personal covenant binding on the covenantor, personally, and not an equitable restriction.

successors in interest to the land will also be able to enforce the covenant against the buyer. But the buyer will still be without protection. If the use of covenants at law were carried to the extreme, and reciprocal covenants at law were made between the buyer and the seller, both the benefit and burden of which ran with the land, a difficulty would still exist when applying them to newly developed areas. A prior purchaser, one who bought a lot before the seller began inserting the reciprocal covenants in the deeds, would have no protection. Yet, if the court determined that the promises amounted to equitable restrictions, such prior purchaser would be protected, on a theory of expectation and reliance. As a practical matter, it is a rarity when reciprocal covenants, the benefit and burden of which both run with the land, are found. It is far more likely that a court will find the necessary intent to create equitable restrictions.

As a final note on the comparison of the effects of a covenant and an equitable restriction, a covenant must always have two essentials. It must "touch the land" and there must be "privity." Equitable restrictions do not require privity.

In the discussion of the enforcement of equitable restrictions, we found that equitable restrictions are enforceable by one lot owner as against any other lot owner. No one can deny the protection which this situation offers the purchaser. However, a covenant at law has one great advantage which should not be forgotten. Since only two persons are normally bound by a covenant, it takes only two people to change or terminate that covenant. In the case of an equitable restriction, all the lot owners have property rights in all the other lots (at least under the majority view with which Wisconsin is in accord), so that the equitable restrictions can only be changed or terminated by the consent of all of the lot owners (unless otherwise specifically provided for in the restrictions).

It was seen in the discussion of the running of equitable restrictions that two factors are essential — notice to the purchaser and the intent to have the restriction run with the land. In drafting we are concerned with the problem of showing the intent. The determining factor in whether the court will find a covenant at law or an equitable restriction is the intent of the parties. Do they mean to bind all the land so as to create a general plan of development?

The introductory clause to a set of restrictions is normally used to show that the restrictions are meant to run with the land. Turning to plat (1), the purpose of the promises is said to be the "preserving the value of said property." This statement throws no light on whether equitable restrictions or covenants running with the land are forthcoming. The words that ". . . the lands described . . . shall be subject to the following restrictions, covenants and conditions . . ." do indicate

the existence of a general plan of development. This is usually a strong indication that the intent of the parties is to create equitable restrictions. However, it is possible that such a plan could be carried out by using individual covenants at law. Furthermore, the evidence of intent of creating equitable restrictions which is provided by a plan of development may be overcome by specific words to the contrary. For example, if the enforcement of the promises were limited to the developer, then the promises would probably be interpreted as covenants at law.

In paragraphs 2, 3, 4, 5 and 6 of plat (1) the "architectural control committee" is given authority to determine the application of the restrictions to a particular case and even to vary the restrictions, themselves. Paragraph 2, for example, requires that all building plans be approved by the committee, and paragraphs 3 and 4 permit the committee to vary area and setback limitations. Keeping this power in mind, it is significant to note that two persons, who happen to be present owners, make up the committee. The net result is a tremendous amount of discretion and control in the hands of the original owners; and there is little doubt but that they have sole control in these matters. This situation leads one to believe that what we have here are covenants at law enforceable only by the covenantees. However, equitable restrictions can be established whereby the power of approval of building plans and the like is in the hands of a committee either on the theory that the lot owners never received such power in the first place, or on a theory of delegation of power whereby the lot owners authorize the committee to do this work for them. Thus, the language to this point is still not conclusive as to whether the intent was to establish covenants at law or equitable restrictions.

Paragraph 8 states that ". . . the restrictions herein contained shall be deemed to be covenants running with the land and shall be binding on all persons having an interest in the lands affected hereby . . . ." It would perhaps be unfair to say that the drafter of this sentence meant "covenants at law" when he used the word "covenants," because of the generally confused use of the term in this area. However, it should be noted that the word "restrictions" is used in the same sentence and is, presumably, cast aside in favor of the term "covenants." Thus, perhaps the drafter did mean "covenants at law."

In the same paragraph the instrument deals with the question of enforcement. It states that ". . . the restrictions and covenants, herein contained may be enforced by proceedings at law or in equity against any person or persons violating or attempting to violate the same; . . . ." No mention is made as to who may enforce the restrictions. If it had stated that all the lot owners had a right to enforce them, then clearly there would be some tangible basis for declaring these promises



to be equitable restrictions. It is true that paragraph 9 does seem to give the lot owners, or at least sixty percent of them, some control over changing of the covenants. Such power in the hands of the lot owners is strong evidence of the existence of the equitable restrictions. However, a general veto power over such change or termination is retained by the original owners. The written declaration signed by sixty percent of the purchasers is little more than a petition which the original owners can either accept or reject, thus leaving the real power over change in the hands of the original owners.

Thus, whether the intent of the parties is to create covenants at law which run with the land, or whether their intent is to create equitable restrictions is not clearly stated. Nowhere is it mentioned that the benefit is to run to the rest of the lands, but just to the developer. Nowhere is it mentioned that the rest of the land is also burdened by the restrictions, or that the owner is bound to insert similar restrictions in the rest of the deeds. Nowhere is it mentioned that all the lot owners have the right to enforce the restrictions. Nevertheless, it is very probable that the Wisconsin Court would declare these promises to be equitable restrictions. Plats 3 and 4 are almost identical to plat 1 in this respect.

In contrast, plat 2 leaves little doubt that equitable restrictions are established. The "whereas" clause, the main purpose of which is to set up the idea of a general plan, states that the promises are "for the benefit of said property as a whole and for the benefit of each owner of any part thereof." The next paragraph states that the promises "shall inure to the benefit of and pass with said property, and each and every parcel thereof, and shall apply to and bind the successors in interest, and any owner thereof." Paragraph 2 clearly sets up a general scheme in stating the purpose of the restrictions. The only evidence, perhaps, in favor of a finding of covenants at law rather than equitable restrictions is the fact that the developer, MCDC (Milwaukee Community Development Corporation), has retained power to approve the building plans. However, this fact by itself is inconclusive. Paragraph 23 explicitly states that any lot owner may enforce the restrictions. This clearly shows an intent to create equitable restrictions. Plats 5 and 6 are substantially identical to plat 2.

Without attempting to draft a model instrument, perhaps a normal set of equitable restrictions for residential development purposes should contain the following elements:

"Owner	Whereas Charlie Brown is the owner of the described land;
Purpose	Whereas it is the intent of the owner to develop the described land as a high class residential area;
Benefit & burden	Whereas it is the intent of the owner that the described land and every parcel thereof be subject to

	the following equitable restrictions; and that the benefit thereof shall inure to the entire tract and to each and every parcel thereof, individually;
Running	Whereas it is the intent of the owner that both the benefit and the burden of the following equitable restrictions shall run with the described land and every parcel thereof; and
Rest of lots	Whereas the owner agrees to insert similar restrictions in all deeds and leases to the lots within the described area of land;
Promise	Therefore, the owner declares that the described land and every parcel thereof shall be burdened by the following equitable restrictions, which burden shall run with the land and every parcel thereof. The equitable restrictions shall inure to the benefit of the described land, and every parcel thereof, and shall run with the land."

Although language similar to this would be sufficient, there would be no harm in inserting a statement of the enforceability of these restrictions containing the following theme:

"The restrictions contained herein may be enforced by any building site owner against any person or persons for violation thereof."

This model is closer in form to plat 2 than it is to plat 1. If the drafter preferred, he could make the introductory clause very brief, as in plat 1. For example:

"The owner of the described land, in order to develop and preserve a high class residential area, declares the said land to be subject to the following restrictions: . . ."

Then, as in plat 1, further reference to the binding effect of these restrictions and their enforceability should be included. Perhaps the clause could read as follows:

"The equitable restrictions contained herein shall be binding on the described land and every parcel thereof, and shall run with the land. Such burden shall inure to the benefit of the described land and every parcel thereof, and shall also run with the land. The restrictions shall be enforceable by any building site owner against any person or persons for violation thereof. The owner agrees to insert similar restrictions in all deeds and leases to lots within the described area of land."

In contrast to these clauses, if the developer wished to establish covenants at law which run with the land, he could insert a clause in each deed similar to the following:

"It is the intention of the owner to convey the described land subject to the following covenants, which covenants are imposed for the exclusive benefit of the grantor and his successors in interest thereto."

No mention is made of the owner's other land; the owner is under no obligation as to his other land; and only the grantor, personally, has the right to enforce the covenants. Thus, despite the fact that a plan of development may exist, by using a clause such as this the promises will be construed as covenants at law and not equitable restrictions.

Somewhere in the set of restrictions the land to be covered should be technically described. If the developer believes that he may wish to subject additional land to the same restrictions at a later date, provision should be made for such inclusion in describing the land. If this is not done, the lot owners of the subsequently added land will not be able to enforce the restrictions against the prior lot owners.

That restriction which limits the use of the land to residential purposes is fairly standard. However, care must be exercised in the choice of words. Generally, the courts have given words their broadest possible interpretation in these situations. One case has held that the word "house" includes a machine shop, so that the establishment of a machine shop on land restricted to houses was not a violation of the restriction.<sup>90</sup> A retaining wall has been held to be a "building." The Court stated:

"The majority rule appears to be that a wall or a fence may constitute a "building" within the meaning of such a restrictive covenant, although Massachusetts has taken a contrary view."<sup>91</sup>

In *State ex rel. Pederson v. Drury* parked automobiles, house trailers and other types of vehicles did not violate a restriction against the erection of a structure. However, the Court went on to state:

"Should it become apparent that it is the purpose of the owner or of any lessee to carry on a general garage business upon this residential strip as if a building therefor had been constructed, it would seem necessary to prevent it, but a use incidental to the business which is incidental and actually transitory in its nature is not a violation of the covenant."<sup>92</sup>

The reason for such broad construction of these words lies in the effort of the courts to curtail the extent to which the use of land is restricted. Thus, when phrasing the restrictive clauses as to use, it should be kept in mind that the courts will probably give the broadest possible meaning to the words used. In view of this, perhaps it would be wise to insert a specific set of definitions as was done in plats (2) and (6).

<sup>90</sup> See: *Peterson v. Gales*, 191 Wis. 137, at 139, 210 N.W. 407, at 408 (1926). In holding that a machine shop did not violate a restriction limiting the property to "houses," the Court said:

"It would require a strict construction to limit the word 'house,' as used in the restrictive covenant, to a family residence."

<sup>91</sup> *Perkins v. Young*, 266 Wis. 33, 62 N.W.2d 435 (1953).

<sup>92</sup> *State ex rel. Pederson v. Drury*, 248 Wis. 243, at 246, 21 N.W.2d 408, at 409 (1945). See also: *Vikes v. Pederson*, 247 Wis. 288, 19 N.W.2d 176 (1944).

Every set of restrictions examined provides for the approval of building plans by some person or persons. In plat (1) a committee comprised of the original owners is established, with provision for succession of the office once the original owners no longer own any of the restricted land. Some such committee of neighbors appears to be a commonly accepted arrangement. In plat (2) the committee consists of MCDC, the developer. The trouble there is that this organization may cease to exist, and there appears to be no provision for a successor to its approval powers. Presumably, if MCDC did cease to exist, those restrictions requiring its approval would become inoperative. This possibility was argued in one case, but was ignored by the court because the controversy was decided on other grounds.<sup>93</sup> It should be noted that because a developer could probably hold the benefit of the restriction in gross, it need not surrender its approval powers merely because it no longer owns any of the restricted land. However, the wisdom of such a practice is to be doubted because of the lack of actual contact with the lots involved.

The restrictions as to cost, quality and size depend upon each individual case. The main danger here is to fix standards which may be suitable today, but which will not be suitable tomorrow. The best example of this is the attempt to fix the cost of the buildings. Any period of inflation or deflation will cause such restrictions to become highly impractical. In plat (6), which was set up in 1928, the minimum cost of the buildings was specifically fixed for every few lots, the prices ranging from \$8,500 to \$16,000. The fluctuation of values in the years that followed make these fixed costs useless. It is far better to control the cost by requiring a certain size of floor area and approval by a committee as to design, building materials, and whatever additional factors may be peculiar to that area. Plat 2 does have a flat \$9,500 minimum on cost which may prove suitable for a time. However, as part of a long range plan it is too rigid.

In considering the types of restrictions imposed, the courts should find little or no difference between positive and negative restrictions.<sup>94</sup> The reason for this is that a positive restriction may be made negative by simply using a double negative. For example:

"Every lot must be properly landscaped subject to the approval of the committee."

This positive restriction may be made negative simply by rewording it to state:

"No lot may be maintained other than a properly landscaped lot subject to the approval of the committee."

<sup>93</sup> See: *Kramer v. Nelson*, 189 Wis. 560, 208 N.W. 252 (1926).

<sup>94</sup> An affirmative restriction was enforced in *Washington Homes Association v. Wanesek*, 252 Wis. 485, 32 N.W.2d 223 (1947), where the Court held valid a restriction calling for an annual charge on the land to be paid to the developer.

The form for establishing the duration of the restriction has become fairly standard in Wisconsin. However, to minimize the drawback of inflexibility of equitable restrictions, the initial period in which the restrictions are in force should be kept as short as is feasible. Plat (1) calls for a period of fifty years which would seem unreasonably long. Plat (2) requires twenty-five years. There seems to be no reason why fifteen years would not be suitable, so long as there were automatic renewals of ten years each, which renewals may be terminated by an instrument signed by a majority of the lot owners.

The method of amendment generally adopted in Wisconsin is by an instrument executed by at least sixty percent of the lot owners. However, in plats (1), (3) and (6) the consent of the developer is required. Such veto power should not be retained because it makes the instrument of the lot owners nothing more than a petition. Plats (2) and (4) do not provide for amendment, an omission which makes the restrictions too fixed and impractical as a long range plan. Because of the practical difficulties in contacting and circulating an amendment which will be acceptable by sixty percent of the lot owners, perhaps an alternative method of amendment should be inserted. It could read as follows:

"Any lot owner may petition the committee or the secretary thereof to amend the restrictions contained herein. The committee shall hold a public meeting to discuss the proposed amendment, notice of which meeting shall be given to all of the lot owners at least three weeks in advance of such meeting. Such notice shall be personal, if feasible. If not, it shall be posted in a suitable place on that owner's lot. The committee shall vote on the amendment within two weeks after the public meeting. If a majority of the committee votes to approve the amendment, then such amendment shall become effective three weeks from the date of such vote unless, at any time up to the date that the amendment is to become effective, an instrument executed by a majority of the lot owners is filed with the secretary of the committee objecting to such amendment. In such event, the amendment will not become operative."

The time limits involved and the number of public meetings required may vary depending on the size of the area of the land involved. However, the idea is to give more flexibility to equitable restrictions. It is often very difficult to obtain the consent of sixty percent of the lot owners to amend the restrictions. Thus, this alternative method would allow the committee to act unless the majority of the lot owners object. However, the original methods of amendment by sixty percent of the lot owners should not be abandoned, for if it were, the committee could refuse to amend, and the lot owners would have no way of compelling them to amend or of bringing about the amendment in any way.

## XIV. CONCLUSION

This discussion has been an attempt to clarify the law of equitable restrictions, especially as it exists in Wisconsin. Confusion has prevailed in this area because of the vacillation between the rules of contracts and the rules of property, neither of which can entirely justify the workings of equitable restrictions. The solution for this confusion is fairly clear. The law of property and the law of contracts were both developed long before equitable restrictions were born. The alleged need for equitable restrictions did not arise until a later date when planners saw the value of controlling the use of land, especially in metropolitan areas. In the attempt to fit this relatively modern concept into the established rules of law, difficulties arose which are still present today.

If equitable restrictions are to remain, they should be recognized as an entity, and not as a by-product of covenants or easements. They are entitled to a set of rules which are peculiar to themselves. In conjunction with this recognition of the development of equitable restrictions as something separate from covenants and easements, a set terminology should be adopted. In this way perhaps some of the confusion can be eliminated.

Thought should be given as to whether the effect of equitable restrictions should be increased or decreased. There is no doubt but that city planning is desirable. But to what extent should it be carried? Today's general viewpoint seems to be the planner's viewpoint. That is, the development of land for the public use, for the general welfare, is of primary importance. Just be sure you leave enough power over the land in the lot owner so that he can say that he "owns" the property. No one outwardly wants to eliminate private ownership. Yet, the private owner cannot build a home or even cut down a bush in his front yard without the consent of "a committee of neighbors." For example, in one set of restrictions it is stated:

*"Preservation of Trees and Shrubs.* No tree with a diameter of 2" or more at a height of 4' from the ground, not any shrub over 3' in height by 3' in spread, beyond 3' from the approved house location, shall be cut down, destroyed, mutilated, moved or disfigured; and all existing trees and shrubs shall be protected and preserved during construction by wells and proper grading."<sup>95</sup>

And is there any limit on this community control? What are the standards to which they are confined? Almost all restrictions provide that the "committee of neighbors" may base their approval upon any consideration whatever, even aesthetics.<sup>96</sup> Where this community con-

<sup>95</sup> See: Plat (2), Greendale, paragraph 8, in the appendix to this paper.

<sup>96</sup> See: *Schneider v. Eckhoff*, 188 Wis. 550, at 556, 206 N.W. 923, at 927 (1926).

trol of "private" property will stop is uncertain. At present there appears to be no limitation.

This writer does not condemn all city planning. However, he does condemn the adoption of the planner's viewpoint as being of primary importance. It is far better to recognize the fact that basically we have a system of private ownership of land. On the one hand, then, we have the essentials which must be present to maintain private ownership. On the other hand we have the bare essentials necessary for effective planning. The vast ground in the middle will be put on one side or the other depending on which approach is adopted. This writer believes that the approach based upon private ownership should be adopted, that the vast middle ground belongs to the private owner, and that city planning must be limited to that which is reasonably necessary.

Nor is this approach something novel in theory. Courts have always emphasized the right of private ownership. Together with this they have continually opposed the restraint of use of privately owned land. It is only recently that some courts have either succumbed to the "community ownership" viewpoint, or that the inadequate set of rules developed have not supplied them with the tools to stop this trend.

What practical answer, then, can be given? Perhaps equitable restrictions should be eliminated entirely. They were a creation of the courts of equity in violation of all the established rules of law, so seemingly legal history would have no serious objection to their abolishment. Covenants at law which run with the land would still be available to restrict the use of land and provide a means of private community restriction on land. Furthermore, public zoning is being given wider application, including the matter of aesthetics.<sup>97</sup> The argumentation that zoning has exceeded its bounds is beyond the scope of this paper; but zoning is mentioned as a possible alternative if equitable restrictions are abolished.

If equitable restrictions are retained, which in all probability they will be, they must be kept to a minimum by giving due effect to private property rights. We must keep the individual in mind so that we do not unwittingly wake up to find ourselves living in a nation of communitized property instead of private property.

## XV. APPENDIX

### (1) Fox Point

Restrictions, protections, covenants, conditions, charges or provisos contained in declaration of restrictions executed by Aaron Derzon and Lucile Derzon, his wife, and Henry Urdan and Marion E. Urdan, his wife, dated January 30, 1956 and recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on February 2, 1956 in Volume 3536 of Deeds at page 307, Document No. 3465572, reciting as follows, to-wit:

<sup>97</sup> For a discussion on aesthetics under the zoning power see: 39 MARQ. L. REV. 135 (1955).

"KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Aaron Derzon and Lucile Derzon his wife; and Henry Urdan and Marion E. Urdan his wife, being the owners of the property described on Exhibit 'A' hereto annexed, for the purpose of preserving the value of said property, do hereby declare and provide that the lands described on said exhibit 'A' shall be subject to the following restrictions, covenants and conditions, for a term of fifty (50) years from the date of recording hereof, to-wit:

"1. All lots shall be used for residential purposes only. No building shall be erected, altered, or placed on any lot other than a dwelling designed for the use and occupancy of a single family only, not to exceed two stories (plus attic) in height, and a private garage for passenger automobiles.

"2. No buildings, main or accessory, fence or wall shall be erected, placed or altered on any lot until the construction, plans and specifications and a plan showing the location of the proposed structure shall have been approved by the architectural control committee as to employment and quality of materials, harmony of exterior design with existing structures, and as to location on the lot, front and rear and side setbacks, and as to topography and finish grade elevations. In no event shall any fence or wall be erected closer than twenty-five (25) feet to any street line or to any pedestrian way, without written consent of the architectural control committee.

"3. No dwelling erected on any lot described on exhibit 'A' shall be smaller than the following schedule of area, measured at first floor level, at exterior perimeter at grade, exclusive of porches; garages, whether attached or unattached; bays; patios; breezeways, etc., that is to say:

#### FOR ONE STORY BUILDINGS

"(a) Not less than fifteen hundred (1500) square feet for Lots numbered Five (5) to Eight (8) both inclusive in Block number Seven (7) Lots One (1) and Two (2) and Four (4) and Five (5) both inclusive and Lots Six (6) to Seventeen (17) both inclusive all in Block numbered Eight (8) Lots One (1) to Six (6) both inclusive in Block numbered Nine (9) and Lots One (1) to Three (3) both inclusive in Block numbered Ten (10)

#### FOR TWO STORY BUILDINGS

"(b) Not less than nine hundred (900) square feet. The architectural control committee, as provided in Paragraph 7 hereof, shall have exclusive jurisdiction to determine whether the area requirements of a one story building or a two story building apply to a particular proposed structure, and shall likewise have the power, in its exclusive judgment and discretion, to reduce or increase the foregoing minimum requirements as to area at finish grade elevation; but no reduction in area shall be more than ten per cent (10%) of the area hereinabove specified. Any such action by such committee shall be final and conclusive.

"4. All lots shall have minimum setbacks from the front line of twenty-five (25) feet, and sideline setbacks in accordance with the requirements of the Village of Fox Point. It is provided further, however, that the architectural control committee may require further front and side setbacks than those hereinabove set forth which in its opinion are consistent with the character of the neighborhood, and its decision shall be final. In the event a lot has frontage on two streets, the architectural control committee shall have the exclusive power to determine the application of front setbacks with relation to the streets in question.

"5. No lot shall be divided into smaller building plots without the consent of the architectural control committee first had and obtained, it being the intent and purpose of the subdividers to develop the subdivision in accordance with the recorded plan.

"6. No noxious or offensive activity shall be carried on upon any lot nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood. Trash, garbage or other wastes shall not be kept except in sanitary containers which shall be properly screened from public view. No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuildings shall be used on any lot at any time as a residence, either temporary or permanently; nor shall any building be occupied until it has been substantially completed in accordance with the plans and specifications submitted to and approved by the architectural control committee.

"7. So long as the undersigned individually or collectively shall own any of the lots described on Exhibit 'A', the authority and functions of the architectural control committee shall be lodged in and exercised by Aaron Derzon and Henry Urdan. When the undersigned no longer own any of such lots, an architectural



control committee consisting of three (3) members shall be elected by the owners of the lots described on Exhibit 'A', each lot representing one vote. Such committee shall be organized in such a manner as may be directed by the Senior Judge of the Circuit Court of Milwaukee County, upon a petition or application therefor made to him by an interested party, and upon such notice as he may direct. Members of the committee shall serve for three (3) years or until their successors have been duly elected. Due notice of the election of such committee shall be filed in the office of the Register of Deeds for Milwaukee County. The committee's approval or disapproval as required in these covenants shall be in writing. In the event the committee, or its designated representative, fails to approve or disapprove within thirty (30) days after duplicate plans and specifications have been submitted to it, approval will be deemed to have been obtained insofar as required by Paragraph 2 hereof only; all other provisions of these restrictions to have persons then or thereafter owning lands described on said Exhibit 'A'.

"8. The restrictions herein contained shall be deemed to be covenants running with the land and shall be binding on all parties and persons having an interest in the lands affected hereby for a period of fifty (50) years from the date this declaration of restrictions is recorded, after which time this declaration of restrictions shall be automatically extended for successive periods of ten (10) years unless an instrument signed by the owners of a majority of the lots described on Exhibit 'A' has been recorded changing said covenants in whole or in part or reducing the term. The restrictions and covenants, herein contained may be enforced by proceedings at law or in equity against any person or persons violating or attempting to violate the same; provided, however, that no action shall be commenced to enforce such restrictions or restrain the violation thereof unless such action is commenced within one year after the completion of the building complained of. Invalidity of any of the covenants or restrictions herein contained by any judgment or court order shall in no wise effect any of the other provisions herein contained, which shall remain in full force and effect.

"9. Any of the foregoing restrictions, protections, covenants, conditions, charges or provisos, may be annulled, waived, changed, modified or amended at any time by written declaration setting forth such annulment, waiver, change, modification of amendment, executed by the owners of at least sixty percent (60%) of the lots described on Exhibit 'A' and with the consent of the undersigned so long as they or either of them shall own any of said lots. Said declaration shall be executed as required by law to entitle it to be recorded and it shall be recorded in the office of the Register of Deeds of Milwaukee County, Wisconsin, before it shall be effective."

(2) Greendale

Restrictions, conditions, covenants, reservations and easements contained in declaration of restrictions executed by The Milwaukee Community Development Corporation, recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on January 20, 1955 in Volume 3389 of Deeds at page 289, Document No. 3362538, reciting as follows, to-wit:

"THIS DECLARATION, made this 20th day of January, 1955, by The Milwaukee Community Development Corporation, hereinafter called MCDC,

"WITNESSETH:

"WHEREAS, MCDC is the owner of the real property described in this Declaration, and is desirous of subjecting the real property as described to the conditions, restrictions, covenants, reservations, and easements for the benefit of said property as a whole and for the benefit of each owner of any part thereof.

"NOW, THEREFORE, The Milwaukee Community Development Corporation hereby declares that the real property hereinafter described shall be used, held, transferred, sold and conveyed subject to the conditions, restrictions, covenants, reservations and easements hereinafter set forth, which shall inure to the benefit of and pass with said property, and each and every parcel thereof, and shall apply to and bind the successors in interest, and any owner thereof.

"*Definition of Terms.* *Building Site* shall mean (1) a recorded lot or (2) two or more contiguous lots recorded under common ownership. *Family* shall mean one or more than one person, living, sleeping, cooking or eating on premises as a single housekeeping unit, and shall exclude a group or groups of persons where 3 or more persons thereof are not related by blood, adoption, or marriage.

"1. *Property Subject to this Declaration.* The following property shall be subject to this declaration:

Lots 7 and 8, in Block 50, Lots 1 thru 11 inclusive, in Block 51, and Lots 1 thru 11 inclusive, in Block 52 in Greendale Center, being a subdivision of a part of Section 34 and a part of the North West  $\frac{1}{4}$  Section 35, all in Township 6 North, Range 21 East, Village of Greendale, Milwaukee County, Wisconsin;

AND

Lots 1 thru 9 inclusive, in Block 61, in Greendale Center Add'n No. 1, being a subdivision of a part of the N.W.  $\frac{1}{4}$  & the S.W.  $\frac{1}{4}$  Section 34, Town 6 North, Range 21 East, Village of Greendale, Milwaukee County, Wisconsin.

"2. *General Purpose.* The purpose of this declaration is to insure the best use and the most appropriate development and improvement of each building site thereof; to protect owners of building sites against such use of surrounding building sites as will detract from the residential value of their property; to preserve, so far as practicable, the natural beauty of said property; to guard against the erection thereon of poorly designed or proportioned structures; to obtain harmonious use of material and color schemes; to insure the highest and best residential development of said property; to encourage and secure the erection of attractive homes thereon, with appropriate locations thereof on building sites; to prevent haphazard and inharmonious improvement of building sites; to secure and maintain proper setbacks from streets, and adequate free spaces between structures; and in general to provide adequately for a high type and quality of improvement in said property, and thereby to preserve and enhance the values of investments made by purchasers of building sites therein.

"3. *Land Use and Building Type.* No lot shall be used except for single family, residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached, single-family dwelling, not exceeding two and one-half stories in height and an attached private garage for not more than two cars.

"4. *Architectural Control.* All structures shall be designed by a registered Architect, a professional Engineer, or equally qualified individual or firm. No building or other structure shall be erected, placed, or altered on any lot until the plans and specifications, and a plan showing the location thereof have been approved in writing by MCDC as to quality, materials, harmony of external design and colors, with existing and planned structures, and as to location with respect to topography, setbacks, finish grade elevation, driveways, and planting.

"5. *Dwelling Cost, Quality and Size.* No dwelling costing less than \$9500.00 (not including garage), based upon cost levels prevailing on the date this declaration is recorded, shall be erected or placed on any building site and the ground floor area of the main structure, exclusive of one-story open porches, terraces and garages, shall be not less than 900 square feet for a one-story dwelling, nor less than 750 square feet for a dwelling of more than one story.

"6. *Building Location.* No building or attached appurtenance shall be located on any lot nearer to the lot line adjoining a street than the following schedule:

Lot 7 in Block 50 .....	35 feet
Lot 11 in Block 51 (from Daffodil Lane) .....	
Lots 10, 11 in Block 52 .....	30 feet
All Lots in Block 61 (including Lot 9, from Catalpa Street extended); Lot 1 in Block 51 (from Dahlia Lane); Lot 8 in Block 50 .....	25 feet
Lots 7, 8, 9, 10 in Block 51; Lots 1, 2, 3, 4, 5 in Block 52; Lot 6 in Block 52 (from Dellrose Court); Lots 1, 11 in Block 51 (from Catalpa Street) .....	20 feet
Lots 2, 3, 4, 5, 6 in Block 51; Lot 7 in Block 51 (from Daffodil Lane on West); Lots 6, 7, 8, 9 in Block 52 .....	15 feet

No building or attached appurtenance shall be located nearer than 10 feet to a side adjoining building site line.

No building or attached appurtenance shall be nearer to the rear lot line than 30 feet in all Lots in Block 61; and Lots 7 and 8 in Block 50. In Blocks 51 and 52 the buildings and attached appurtenances shall be not more than 45 feet in depth, measured from the front building line facing the street; or closer to the rear lot line than 10 feet.

For the purposes of this paragraph, eaves, steps, and open porches shall not be considered as a part of a building, provided, however, that this shall not be

construed to permit any portion of a building on a lot to encroach upon another lot.

"7. *Auto Parking, Garage, etc.* Each lot shall provide for the on-site parking of one auto, and not more than two; to consist of a properly surfaced area, a carport, a garage, or a combination of any two; and connected to the street by a properly surfaced driveway. The parking area shall be located within the building setback lines as herein defined. Carport or Garage shall harmonize with the house as to design, materials, and finished floor elevations.

"8. *Preservation of Trees and Shrubs.* No trees with a diameter of 2" or more at a height of 4' from the ground, nor any shrub over 3' in height by 3' in spread, beyond 3' from the approved house location, shall be cut down, destroyed, mutilated, moved or disfigured; and all existing trees and shrubs shall be protected and preserved during construction by wells and proper grading.

"9. *Ground Fill on Building Site.* Where fill is necessary on the building site to obtain the proper topography and finished ground elevation it shall ground fill free of waste material and shall not contain noxious materials that will give off odors of any kind, and all dumping of fill material shall be leveled immediately after completion of the building. Any excess excavation earth shall be removed from the building site and deposited within the Village of Greendale where directed by MCDC.

"10. *Easements.* In addition to the easements shown on the recorded plat, there is hereby reserved, for utility purposes, an easement five feet in width extending along the rear of each building site, but the owner thereof may select the site of each pole and equipment which it may be necessary to install in said reserved area.

"11. *Nuisances.* No noxious odors shall be permitted to escape from any building site and no activity which is or may become a nuisance or which creates unusually loud sounds or noises shall be suffered or permitted on any building site.

"12. *Temporary Structures.* No structure of a temporary character, and no trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence, either temporarily or permanently.

"13. *Signs.* No sign of any kind shall be displayed to the public view on any lot except one professional sign of not more than one square foot, or one sign of not more than five square feet advertising the property for sale or rent, or a sign used to advertise the property during the construction and sales period. All signs shall be located within the building setback lines as defined herein-before.

"14. *Animals and Poultry.* No animals, livestock, or poultry of any kind shall be raised, bred or kept on any lot, except that dogs, cats or other household pets may be kept provided that they are not kept, bred or maintained for any commercial purpose, or allowed to annoy neighbors.

"15. *Garbage and Refuse Disposal.* No lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for the storage or disposal of such material shall be kept in a clean and sanitary condition, and suitably screened from view from streets.

"16. *Water Supply and Sewage Disposal.* No individual water-supply system or sewage-disposal system shall be permitted on any lot. All houses shall be connected to the Municipal water system and sewage system.

"17. *Utility Connections.* All telephone and electric house connections shall be underground to connect to present underground lines in the street right-of-way; and such connections shall remain underground if such utility lines continue to be available; otherwise house connections may be overhead.

"18. *Fences, Walls, Hedges, etc.* No fence, wall, hedge, or mass planting shall be permitted to extend beyond the minimum front building setback line established herein for Lots 1 thru 9 in Block 61. In Blocks 50, 51 and 52, no fence, wall, or hedge shall be permitted on the front, side, or rear lot lines.

"19. *Sight Distance at Intersections.* No fence, wall, hedge or shrub planting which obstructs sight lines at elevations between 2 and 6 feet above the roadways shall be placed or permitted to remain on any corner lot within the triangular area formed by the street property lines and a line connecting them at points 25 feet from the intersection of the street lines, or in the case of a rounded property corner from the intersection of the street property lines extended. The same sight line limitations shall apply on any lot within 10 feet from the inter-

section of a street property line with the edge of a driveway or alley pavement. No tree shall be permitted to remain within such distances of such intersections unless the foliage line is maintained at sufficient height to prevent obstruction of such sight lines.

"20. *Land Near Parks*. No building shall be placed nor shall any material or refuse be placed or stored on any lot within twenty-five feet of the property line of any park, except that clean fill may be placed nearer, provided that natural drainage course is not altered or blocked by such fill.

"21. *Access to Park Land*. No driveway or vehicular access shall be provided or permitted to present or future park land from abutting property subject to this declaration.

"22. *Term*. This declaration shall run with the land and shall be binding on all persons claiming under MCDC for a period of twenty-five years from the date this declaration is recorded, after which time it shall automatically stand renewed for successive periods of ten years and until an instrument signed by the owners of a majority of the lots has been recorded, changing said covenants in whole or in part.

"23. *Enforcement*. Any building site owner may enforce the provisions hereof by proceedings at law or in equity against any person or persons violating or attempting to violate any provision of this declaration, either to restrain violation or to recover damages, or both.

"24. *Severability*. Invalidity of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions, which other provisions shall remain in full force and effect."

(3) Greenfield

Restrictions, covenants, agreements, reservations, conditions and charges contained in Declaration of Restrictions of Hale Park Addition No. 1 Executed by HALE PARK DEVELOPMENTS, INC., dated January 26, 1954 and recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on January 28, 1954, in Volume 3249 of Deeds at pages 452 to 459 inclusive, as Document No. 3268335.

(4) Town of Lake

Restrictions, covenants and easements contained in an instrument executed by Sid Dwyer Building Co., dated August 29, 1951, and recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on September 4, 1951, in Volume 2923 of Deeds at page 559, as Document No. 3051447.

(5) Country Club Highlands

Restrictions, protections and conditions contained in declaration of restrictions executed by Mound Investment Company, dated July 6, 1950, and recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on July 10, 1950, in Volume 2765 of Deeds at pages 254 to 260 inclusive, as Document No. 2952839.

(6) Colonial Highlands

Restrictions, protections, easements, covenants, conditions, charges and provisions contained in an instrument executed by Burleigh Realty Company, Inc., dated June 18, 1928, and recorded in the office of the Register of Deeds for Milwaukee County, Wisconsin, on June 19, 1928, as Document No. 1619582.